Supreme Court, U.S.
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IN THE

Supreme Court of the United States

DANIEL E. CARPENTER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Criminal Appeals Act of 1970, as amended by the Comprehensive Crime Control Act of 1984, 18 U.S.C. § 3731 (2000 & Supp. IV 2004), allows the government to take an interlocutory appeal from an order of the district court granting a defense motion for a new trial, which was granted in this case due to the government's improper closing arguments. The questions presented are:

1. Whether the Double Jeopardy Clause entitles a defendant to interlocutory review of his claim that the government failed to introduce legally sufficient evidence at his first trial *before* he is retried after a motion for a new trial is granted?

2. Whether the First Circuit erred by holding, in conflict with the Fourth Circuit, that a defendant is not entitled to cross-appeal a district court's denial of his motion for judgment of acquittal based on the insufficiency of the evidence, if the *government* first takes an interlocutory appeal under 18 U.S.C. § 3731 from an order of the district court granting a new trial?

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JURISDICTION

The First Circuit entered judgment on July 18, 2007. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Double Jeopardy Clause of the Fifth Amendment provides: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S Const. amend. V. The relevant portion of 18 U.S.C. § 3731 provides, in pertinent part:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information or granting a new trial after verdict or judgment, as to any one or more counts, or any part thereof, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

STATEMENT OF THE CASE

This case presents several important and intertwined issues of Double Jeopardy law and criminal procedure. It has been clear since *Burks v. United States*, 437 U.S. 1 (1978), that retrial is barred by double jeopardy principles if a trial or appellate court grants a defendant's motion for judgment of acquittal on the ground that the prosecution's evidence was insufficient. In *Richardson v. United States*, 468 U.S. 317, 325 (1984), this Court held that a defendant can be retried unless "there has been some event, such as an acquittal, which terminates the original jeopardy," and that a declaration of a mistrial due to a hung jury does not qualify. Beyond "an acquittal," this Court did not elaborate on what "some event" might include.

In the wake of *Richardson*, courts and commentators have struggled with whether a *conviction* can be "some event, such as an acquittal, which terminates the original jeopardy." The issue usually arises when a defendant moves after conviction for a new trial because of evidentiary or other "trial error," but also moves for judgment of acquittal on sufficiency grounds. Is the trial court or court of appeals required to rule on the defendant's separate sufficiency motion if they intend to grant a new trial on "trial error" grounds? Most courts have read *Richardson* to hold that defendants have no constitutional entitlement to a ruling on their sufficiency motion—even though, if that motion is meritorious and granted, double jeopardy bars retrial. But that conclusion is so obviously inconsistent with fundamental fairness and the values underlying the Double Jeopardy Clause that most of the circuits and some state courts

have adopted a "prudential" rule requiring appellate panels to reach an alternative sufficiency argument if it is presented.

This case presents an even more obviously unfair twist on that common situation. 18 U.S.C. § 3731 now allows the government to take an interlocutory appeal from a district court's grant of a defendant's motion for a new trial. The issue in this case is whether, when the government exercises that right and asks a court of appeals to overturn the grant of a new trial made under Federal Rule of Criminal Procedure 33, a defendant may cross-appeal the denial of a motion for judgment of acquittal made under Federal Rule of Criminal Procedure 29. As the First Circuit expressly acknowledged below, the courts of appeals are divided on this important question. App. 28a.

This case presents the ideal vehicle for this Court to resolve that conflict and to give criminal defendants (who, after the grant of a new trial, are entitled to a renewed presumption of innocence) at least the same interlocutory appellate rights regarding a denial of a motion for judgment of acquittal as those recently granted to the government regarding the grant of a motion for a new trial. There are strong arguments that defendants ought to be entitled to some form of review of their sufficiency claim prior to retrial as a matter of constitutional right under the Double Jeopardy Clause. But even if this Court is not prepared to embrace that constitutional position, there is no good reason to deny a defendant interlocutory review of his sufficiency claim *at least* in those cases where the government has already taken an interlocutory appeal of the district court's grant

of a new trial motion. The First Circuit's holding that such cross-appeals are impermissible perversely puts a defendant whose motion for a new trial is granted by the district court in a worse position than if that motion had been denied by the district court, or had never been made. This Court could reverse that holding and resolve the conflict in the circuits via several different analytical routes, and as a matter of basic fairness and the wise administration of justice it should.

1. Background

This mail and wire fraud prosecution began with the historic stock market collapse of December 2000. From 1998 until the end of 2000, Benistar Property Exchange Trust Co., Inc. ("BPE"), of which Carpenter was chairman and Martin L. Paley ("Paley") was president, acted as a "qualified intermediary" successfully completing 119 out of 126 like-kind property exchanges under I.R.C. § 1031(a) (2005). App. 2a. Under normal circumstances, when a taxpayer sells an investment property, tax must be paid on the gain. An I.R.C. § 1031 Tax Deferred Exchange allows an exception to payment of the capital gains tax. When a taxpayer (called an "Exchangor") sells investment real estate and replaces it with different investment real estate using an exchange, the payment of capital gains tax normally required on such a sale can be deferred. As long as a property used for investment is replaced with similar property within 180 days, no gain is recognized at that time; rather, the gain is deferred until the eventual sale of the replacement property. I.R.C. § 1031(a)(3). However, upon the sale of the relinquished property, "[i]f taxpayers take possession of the cash, they are

disallowed the tax advantages of the like-kind exchange provisions." Treasury Inspector General for Tax Administration, U.S. Dep't of Treasury, Publ'n No. 2007-30-172, *Like-Kind Exchanges Require Oversight to Ensure Taxpayer Compliance* 7 n.14 (2007) ("2007 Treasury Report"). In order to avoid taking possession of the cash from the sale of the relinquished property, an Exchangor normally relies on the "safe harbor" provided by 26 C.F.R. § 1.1031(k)-1(g)(4) (2002), in which the Exchangor utilizes the services of a "qualified intermediary" (such as BPE) to invest the cash until the purchase of the replacement property. "[I]f taxpayers do not specifically follow the rules for like-kind exchanges, they could be held liable for taxes, penalties, and interest on their transactions." 2007 Treasury Report, at 1 (Memorandum from Michael R. Phillips for Comm'r, Small Bus./Self-Employed Div. (Sept. 17, 2007)).

Paley (working out of his office in Massachusetts) was responsible for BPE's marketing, had the *exclusive* interactions and communications with the Exchangors who utilized BPE's services, and "solicited the exchangors and executed the transaction documents." App. 62a. Carpenter (working out of his office in Connecticut) had no contact with the Exchangors and his role was simply to invest the Exchangors' funds *after* they were forwarded to BPE's accounts, first at Merrill Lynch and later at PaineWebber. App. 3a–4a. When the stock market collapsed in December 2000, BPE's investment accounts at PaineWebber sustained losses of approximately $9 million of the funds of seven BPE Exchangors (all of whom were professional real estate

developers or investors) out of over $100 million in total Exchangor funds invested.[1] App. 4a.

In order to generate the promised 3% or 6% return on the Exchangors' funds, App. 2a–3a, Carpenter caused BPE to invest *all* Exchangor funds in stock options of highly-rated companies and other investment-grade, publicly-traded securities offered through Merrill Lynch and later PaineWebber. App. 3a–4a. The seven Exchangors whose funds were lost blamed Carpenter's investment strategy for the losses, notwithstanding that investing in stock options is prohibited by neither I.R.C. § 1031(a), 26 C.F.R. § 1.1031(k)-1, case law, nor—most importantly—BPE's written agreements with the Exchangors. App. 5a. Carpenter attributed the losses to certain actions taken by PaineWebber, and caused BPE to file an arbitration claim against PaineWebber with the National Association of Securities Dealers, Inc. ("NASD"). In December 2005, the NASD arbitration panel unanimously awarded BPE $12.6 million against PaineWebber. App. 89a-95a. The NASD arbitration award was upheld on appeal and, in April 2007, BPE

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1. In January 2001, the seven Exchangors whose funds were lost sued BPE, Carpenter, Paley, Merrill Lynch, PaineWebber, and others in Massachusetts, even though Carpenter resides in Connecticut. The Exchangors' only viable legal claim is for breach of contract against BPE because the Exchangors had no dealings or communications with Carpenter and Carpenter had no personal obligation to them. Furthermore, because no fiduciary relationship existed as a matter of federal law, *see* 26 C.F.R. § 1.1031(k)-1(k)(2), the Exchangors' state law claims for breach of fiduciary duty against Carpenter have no basis.

obtained a final judgment against PaineWebber in New York State Supreme Court for $14.2 million. Judgment, *In re UBS PaineWebber, Inc.*, Index No. 600156/06 (N.Y. Commercial Div. April 18, 2007).

The government elected to pursue this matter criminally. As the government's own auditor and forensic accountant acknowledged at trial, however, Carpenter did not take, steal, misappropriate, divert, or embezzle any Exchangor funds. App. 96a. To the contrary, Carpenter invested and lost $2 million of his *own* money in BPE to help keep the business afloat. App. 96a. Moreover, it is undisputed that Carpenter voluntarily provided thousands of pages of documents to the government; did not "cover up" conduct by himself or others; and did not tell anyone to lie, engage in misconduct, or otherwise break the law.[2]

2. District Court Proceedings

In February 2004, Carpenter was indicted in the District of Massachusetts on 14 counts of wire fraud and five counts of mail fraud, in violation of 18 U.S.C. §§ 1341 and 1343 (2002). App. 4a. In September 2004, shortly after the district court heard argument on Carpenter's motion to dismiss the indictment for failure to allege the necessary elements of a crime (including materiality),

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2. By contrast, the record suggests that Paley may have made false statements to federal agents and committed perjury during his trial testimony. App. 70a, 77a. The district court noted "[t]he confusing and contradictory nature of Paley's testimony." App. 76a. *See also* App. 84a–88a. Paley was not charged with any crime. App. 71a–72a.

lack of fair notice, and lack of venue, the government returned a superseding indictment.[3]

Read with the benefit of post-trial hindsight and in a light most favorable to the government, the superseding indictment essentially alleged that Carpenter caused the seven Exchangors whose funds were lost (out of 126 total Exchangors) to mail and/or wire their funds to BPE based on written and/or oral affirmative misrepresentations that the funds would be "safe." App. 5a. During pretrial proceedings, the government expressly conceded that whether BPE's investments resulted in gains or losses was irrelevant to whether a scheme to defraud existed. Moreover, "[t]here was no evidence at trial that Carpenter personally made any *oral* misrepresentations, so the focus was on the *written* statements that the indictment alleged were materially false." App. 58a (emphasis added). Consequently, the government abandoned its reliance on any *oral* misrepresentations as charged in the superseding indictment because Carpenter did not speak to or deal with any of the Exchangors—that was Paley's job. App. 57–58a. Instead, the government

3. The government's ostensible purpose in seeking the superseding indictment was to add factors for the jury's determination in light of *Blakely* v. *Washington*, 542 U.S. 296 (2004), but the government also added the word "material" several times throughout the document. The superseding indictment, however, failed to remedy the original indictment's primary defect—placing Carpenter on fair notice as to precisely what conduct of his was alleged to be "criminal" as required by *Hamling* v. *United States*, 418 U.S. 87, 117 (1974). The district court nevertheless denied Carpenter's motion to dismiss as well as his motion to transfer venue to the District of Connecticut pursuant to Federal Rule of Criminal Procedure 21(b).

was forced to rely exclusively on alleged *written* misrepresentations (although not a single document introduced into evidence stated that the funds would be "safe") and, more importantly, on Carpenter's omitting to disclose to the Exchangors that their funds would be invested in stock options (without proving that Carpenter had a *duty* to disclose and while admitting that, since Paley alone dealt with the Exchangors, Carpenter did not have the *opportunity* to disclose). App. 58a, 62a.

There was no conspiracy charge or claim of agency between Carpenter and Paley although there was an aiding and abetting allegation against Carpenter pursuant to 18 U.S.C. § 2, "during trial the government disavowed a theory of Carpenter's culpability based on his having aided or abetted Paley." App. 65a. Consequently, the government's case focused on Carpenter's *own* acts (which amounted simply to investing the funds), rather than on Paley's acts (communicating with the Exchangors and drafting the marketing materials) that the Government might have tried to attribute to Carpenter. App. 65a. And even though the government had conceded that the investment losses were irrelevant to its theory of prosecution, "considerable evidence about the trading losses was introduced by the government. The figures and charts demonstrating the extent and persistence of the trading losses were dramatic."[4] App. 81a.

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4. Carpenter moved for a mistrial on this issue, arguing that the admission of such concededly irrelevant evidence was unduly prejudicial to the defense. The district court denied the motion. App. 11a.

After a three-week trial in July 2005, Carpenter moved for a judgment of acquittal at the close of the government's case and again at the close of all the evidence pursuant to Federal Rule of Criminal Procedure 29(a). Those motions were denied. During its closing and rebuttal arguments, the government repeatedly employed "gambling" metaphors to characterize Carpenter's investment strategy. App. 78a--79a. The "thus-incited jury," App. 79a, found Carpenter guilty on all counts.[5]

Carpenter timely filed a post-verdict motion for judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29(c). App. 7a. "In his sufficiency challenge, Carpenter raise[d] arguments of causation, intent, constructive amendment of the indictment, reliance upon a theory of liability based on omission, good faith as an absolute defense, and venue." App. 32a. The district court denied that motion, concluding that, while "the jury would certainly have been warranted in concluding beyond a reasonable doubt that Carpenter acted with intent to defraud, . . . *a contrary conclusion also would have been rationally possible on the evidence.*" App. 82a (emphasis added). Carpenter also timely moved for a new trial pursuant to Federal Rule of Criminal Procedure 33(b)(2). App. 7a. In December 2005, the district court granted Carpenter's motion for a new trial due to the government's improper and excessive use of "gambling" metaphors in its closing and

5. The jury returned its verdict in July 2005, but the NASD arbitration award against PaineWebber was not issued until December 2005. App. 89a. Thus, the jury was unable to consider the significance of that award when deliberating whether Carpenter was criminally responsible for the Exchangors' losses.

rebuttal arguments. App. 78a–83a. The district court explained that, "though sufficient to withstand a motion for judgment of acquittal, *the case was not so strong* that it can confidently be said that the repeated 'gambling' references had no illegitimate effect on the jury's assessment of the evidence." App. 82a (emphasis added).

In January 2006, the government timely appealed pursuant to 18 U.S.C. § 3731 the district court's order granting a new trial. Carpenter then timely cross-appealed pursuant to Federal Rule of Appellate Procedure 4(b)(1)(A)(ii) the denial of his motion for judgment of acquittal.

3. Court of Appeals Proceedings

The First Circuit ordered both parties to address in their merits briefs whether the court properly had jurisdiction over Carpenter's cross-appeal. It then affirmed the grant of a new trial based on the government's improper closing arguments (without addressing Carpenter's other arguments in support of a new trial). App. 23a. The First Circuit afforded "substantial deference" (App. 23a) to the district court's conclusion that those "improper arguments affected the outcome of the trial." App. 21a. Accordingly, the First Circuit found "no basis for concluding that the district court abused its discretion in ordering a new trial." App. 23a.

However, the First Circuit dismissed Carpenter's cross-appeal of the denial of his motion for judgment of acquittal for lack of appellate jurisdiction. App. 33a. The court held that Carpenter was not appealing from any

"final decision" of the district court within the meaning of 28 U.S.C. § 1291. It acknowledged this Court's holding in *Abney v. United States*, 431 U.S. 651, 659 (1977), that double jeopardy claims satisfy the requirements of the collateral order doctrine, and the "practical appeal" of Carpenter's point that refusing to hear the sufficiency claim "would burden defendants with a 'Hobson's choice' between: (1) waiving the right to move for a new trial in order to ensure appellate review of a sufficiency claim; and (2) moving for a new trial and losing the right to appeal a sufficiency claim arising from the first trial." App. 25a.

The court nonetheless held that Carpenter had no viable double jeopardy claim because of *United States v. Porter*, 807 F.2d 21, 24 n.2 (1st Cir. 1986), which extended this Court's decision in *Richardson* (concerning mistrials) to hold that a conviction and subsequent reversal for trial error does not terminate the former "continuing jeopardy." App. 26a–27a. And it held that Carpenter's sufficiency of the evidence claim did not satisfy the requirements of the collateral order doctrine because it is "deeply entwined with the merits." App. 32a. It acknowledged that the Fourth Circuit had expressly upheld the exercise of interlocutory appellate jurisdiction under these same circumstances in *United States v. Greene*, 834 F.2d 86 (4th Cir. 1987), but expressly "decline[d] to follow" that decision. App. 28a–29a.

REASONS FOR GRANTING THE PETITION

This case involves an important constitutional issue that has bedeviled courts and commentators since this Court's decision in *Richardson*, and a question of jurisdiction and procedure of profound importance that has divided the courts of appeals.

The district court in this case acknowledged that "Carpenter stands farther back, both in time and proximity, from the critical events that are the gist of the charged offenses," App. 62a, and stated that although the jury found intent to defraud, "a contrary conclusion also would have been rationally possible on the evidence." App. 82a. At a minimum that is an acknowledgment that Carpenter has a serious claim that the evidence was insufficient for conviction.[6] If the court of appeals had reversed the district court's denial of Carpenter's sufficiency motion, a retrial would violate double jeopardy principles under *Burks*. But Carpenter

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6. Arguably that conclusion *compels* a judgment of acquittal because:

> [I]f the evidence viewed in the light most favorable to the verdict gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence of the crime charged, this court must reverse the conviction. This is so because ... where an equal or nearly equal theory of guilt and a theory of innocence is supported by the evidence viewed in the light most favorable to the prosecution, a reasonable jury *must necessarily entertain* a reasonable doubt.

United States v. *Flores-Rivera*, 56 F.3d 319, 323 (1st Cir. 1995) (internal citations and quotation marks omitted).

never got a chance to present that issue to the First Circuit because the district court granted his alternative motion for a new trial—and the appeal was taken by the government rather than the defendant.

First, Carpenter is undeniably entitled to an interlocutory appeal under the collateral order doctrine if double jeopardy principles bar retrial in these circumstances. The "continuing jeopardy" analysis of *Richardson* should not be extended to situations like this one. A mistrial after a hung jury does not terminate the original jeopardy but a completed trial resulting in a conviction has reached a far greater state of finality. And permitting the government to retry a defendant after a fully completed trial in which the evidence was insufficient for conviction offends the core values the Double Jeopardy Clause was meant to protect.

Second, when a defendant moves for a new trial because of "trial error," and for a judgment of acquittal on sufficiency grounds, the trial court and court of appeals should reach and decide both issues as a matter of fairness, prudence, and the wise administration of justice even if doing so is not required by the Double Jeopardy Clause. Indeed, many of the circuits and state supreme courts have explicitly adopted a "prudential" rule requiring appellate panels to address a defendant's alternative sufficiency claim on the merits if it is presented—even if the court is inclined to reverse in any event on the ground that a new trial should have been awarded.

This case differs from that common pattern only because the district court granted Carpenter's motion for a new trial, the appeal here was thus taken *by the government*, and the defendant needs to raise the sufficiency issue by cross-appeal. That posture raises a

finality issue not present in the more common scenario, but the collateral order doctrine is rooted in a "practical rather than a technical construction" of finality, *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949), and the defendant's equities are even more powerful in this setting. If the government is permitted to interrupt the ordinary criminal process with an interlocutory appeal, defendants should be permitted to present their own sufficiency claims that, if accepted, would establish a constitutional right not to be retried and terminate the litigation rather than prolong it. The First Circuit in this case acknowledged a conflict with the Fourth Circuit, which has recognized that denying defendants a right to cross-appeal in this setting would be "unfair," and would "encourage piecemeal review and unduly delay the final resolution of a criminal case." *Greene*, 834 F.2d at 89. This Court should grant review to resolve that conflict.

1. The Double Jeopardy Clause Substantively Bars Retrial After A Complete Trial Ending In Conviction, If The Evidence Was Insufficient

The prohibition of the Double Jeopardy Clause "is not against being twice punished, but against being twice put in jeopardy; and the accused, whether convicted or acquitted, is equally put in jeopardy at the first trial." *United States* v. *Ball*, 163 U.S. 662, 669 (1896). "The common law not only prohibited a second punishment for the same offence, but it went further and forbid a second trial for the same offence, whether the accused had suffered punishment or not, and whether in the former trial he had been acquitted or convicted." *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 169 (1873).

"That guarantee has been said to consist of three separate constitutional protections. It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969).

> Moreover it is not even essential that a verdict of guilt or innocence be returned for a defendant to have once been placed in jeopardy so as to bar a second trial on the same charge. This Court, as well as most others, has taken the position that a defendant is placed in jeopardy once he is put to trial before a jury so that if the jury is discharged without his consent he cannot be tried again.

Green v. United States, 355 U.S. 184, 188 (1957).

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Id. at 187-88.

"The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding . . . where the Double Jeopardy Clause is applicable, its sweep is absolute." *Burks*, 437 U.S. at 11 & n.6.

> This prohibition, lying at the core of the Clause's protections, prevents the State from honing its trial strategies and perfecting its evidence through successive attempts at conviction. Repeated prosecutorial sallies would unfairly burden the defendant and create a risk of conviction through sheer governmental perseverance.

Tibbs v. Florida, 457 U.S. 31, 41–42 (1982); *see* 12 Charles Viner, *A General Abridgement of Law & Equity* 479 (2d ed. 1794) ("[T]he mischief might be very great if the party should be put to a new trial, for then his adversary would see where he failed, and might use ill means to prove what he failed in before.").

Accordingly this Court has held that a holding by a trial court or court of appeals that the evidence was insufficient bars retrial. In *Richardson*, however, this Court noted that

> [without] exception, the courts have held that the trial judge may discharge a genuinely deadlocked jury and require the defendant to submit to a second trial. This rule accords recognition to society's interest in giving the

> prosecution one complete opportunity to convict those who have violated its laws.

468 U.S. at 324 (quoting *Arizona v. Washington*, 434 U.S. 497, 509 (1978)). This Court held that "unforeseeable circumstances that arise during a trial making its completion impossible, such as the failure of a jury to agree on a verdict" did not implicate the "type of oppressive practices at which the double-jeopardy prohibition is aimed." *Richardson*, 468 U.S. at 324–25. It then held that *Burks* could be "readily reconciled" with the availability of retrial after mistrial, on the ground that "the *Double Jeopardy Clause* by its terms applies only if there has been some event, such as an acquittal, which terminates the original jeopardy." *Id.* at 325.

After *Richardson*, courts and commentators have struggled with whether retrial is barred after a complete trial ending in conviction, at which the evidence was constitutionally insufficient. There are good reasons to think so. *See, e.g.*, Sarah O. Wang, Note, *Insufficient Attention to Insufficient Evidence: Some Double Jeopardy Implications*, 79 Va. L. Rev. 1381, 1397–1409 (1993) (arguing that *Richardson* should be confined to the mistrial context or overruled). A trial ending in conviction does not implicate "unforeseeable circumstances that arise during trial making its completion impossible," or the historic principle that the prosecution should have at least one complete opportunity to prove its case. *Richardson*, 468 U.S. at 324–25. And there is certainly support for the idea that after conviction the defendant has been exposed to a full "jeopardy." *See, e.g., Crist v. Bretz*, 437 U.S. 28, 33 (1978)

(referring to the English common-law rule that "a defendant has been put in jeopardy only when there has been a conviction or an acquittal—after a complete trial"); *United States v. Scott*, 437 U.S. 82, 92 (1978) (equating the term "final judgment" with a "final determination of guilt or innocence"). Indeed, at least one state Supreme Court has declined to follow *Richardson* on common law grounds. *See Berry v. Commonwealth*, 473 N.E.2d 1115, 1116 (1985) (recognizing Massachusetts common law double jeopardy right against retrial after hung jury, if evidence was insufficient).[7]

The fundamental policy of the Double Jeopardy Clause—to avoid giving the prosecution multiple bites at the apple—is also implicated just as strongly after erroneous conviction as after acquittal. And allowing retrials without ever considering the defendant's possibly meritorious sufficiency challenge puts defendants to what the First Circuit acknowledged to be a Hobson's choice. If the defendant abandons his arguments that the trial was procedurally unfair, he guarantees that the district court and court of appeals will reach his sufficiency claim, and if he prevails the Double Jeopardy Clause will preclude retrial. But if he has the temerity to object to "trial errors" by then he places himself in danger of being retried even if the

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7. Language in *Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294 (1984), suggests that conviction does not terminate jeopardy, but *Lydon* "arose in the unique context of Massachusetts' two-tier trial system," and "the unique trial procedure at issue in the case largely determined the outcome, and subsequent cases have confined *Lydon* to its facts." Wang, *supra*, at 1389.

evidence was also constitutionally insufficient. That is fundamentally unfair and would make sense only if a defendant waives his double jeopardy right in some sense by requesting a new trial. That used to be the rule, *see Yates v. United States*, 354 U.S. 298 (1957); *Bryan v. United States*, 338 U.S. 552 (1950), but this Court expressly rejected that notion in *Burks*, 437 U.S. at 18.

Richardson suggests no abstract theory for determining what sorts of events terminate jeopardy as a formal matter, so the balance of constitutional interests between the prosecution and defense must be considered. There is essentially nothing on the prosecution's side of the ledger once a trial has been fully completed to conviction, if the evidence it mustered at trial was constitutionally insufficient. And in any event "continuing jeopardy" is just a convenient formalism that this Court has readily disregarded when the policies underlying the Double Jeopardy Clause suggest a different answer. *See, e.g.*, Wang, *supra*, at 1398 & n.110; *Oregon v. Kennedy*, 456 U.S. 667, 679 (1982) (retrial after mistrial is barred if the prosecution intentionally provoked the mistrial).

In the wake of *Burks* and *Richardson*, the circuits divided on how to analyze cases involving conviction followed by alternative arguments for retrial and for acquittal. *See* Wang, *supra*, at 1382 & n.4–6. Many of the early cases clearly assumed that some interlocutory review of the defendant's alternative sufficiency arguments was required by double jeopardy principles. *See, e.g., Vogel v. Pennsylvania*, 790 F.2d 368, 377 (3d Cir. 1986) (granting habeas relief because "had the issue been addressed by the Pennsylvania courts,

the meager evidence of sanity relied upon by the Commonwealth at the second trial would have been found insufficient"); *United States v. Haddock*, 961 F.2d 933, 934 (10th Cir. 1992); *United States v. Szado*, 912 F.2d 390, 393 (9th Cir. 1990); *United States v. Quinn*, 901 F.2d 522, 529 & n.5 (6th Cir. 1990). More recently the circuits seem to have settled into a rough consensus that interlocutory review of sufficiency arguments after conviction and prior to retrial is not technically compelled by the Double Jeopardy Clause, but is nonetheless strongly required by principles of fairness and prudence. *But see United States v. Wiles*, 106 F.3d 1516, 1518 (10th Cir. 1997) ("[W]hen we reverse on appeal because of a procedural error at trial and remand for a new trial, the prohibition against double jeopardy requires us to address a defendant's claim that the evidence presented at trial on the reversed count was insufficient."). Accordingly, most circuits have explicitly adopted an internal rule that panels are prudentially required to rule upon a defendant's separate sufficiency argument if it is presented—and are quite serious about enforcing compliance with those rules if a panel fails to comply. *See, e.g., Patterson v. Haskins*, 470 F.3d 645, 651–60 (6th Cir. 2006), *cert. denied*, 2007 U.S. LEXIS 10434 (2007); *United States v. Bobo*, 419 F.3d 1264, 1268 (11th Cir. 2005); *United States v. Adkinson*, 135 F.3d 1363, 1379 n.48 (11th Cir. 1998); *United States v. Miller*, 952 F.2d 866, 872–74 (5th Cir. 1992); *United States v. Bishop*, 959 F.2d 820, 829 n.11 (9th Cir. 1992), *overruled in part as stated in Boyle v. Brown*, 404 F.3d 1159 (9th Cir. 2005); *United States v. Anderson*, 896 F.2d 1076, 1077–78 (7th Cir. 1990); *see also Conn. v. Padua*, 869 A.2d 192, 218–20 (Conn. 2005) (finding it unnecessary to reach double jeopardy argument because "[i]nterests of judicial

efficiency, sound appellate policy and fundamental fairness require a reviewing court to address a defendant's insufficiency of the evidence claim prior to remanding a matter for retrial because of trial error"). Most of the courts of appeals and state courts have concluded, in other words, that these circumstances are within the formalistic "continuing jeopardy" holding of *Richardson*—but that that holding is so obviously unfair and senseless that it should be disregarded as a prudential matter.

Justice Brennan's concerns voiced in *Richardson* apply even more strongly here:

> Accordingly, a defendant who is constitutionally *entitled to an acquittal* but who fails to receive one . . . is worse off than a *guilty* defendant who is acquitted due to mistakes of fact or law. . . . I do not believe this paradoxical result is faithful to the principle we have repeatedly reaffirmed that the Double Jeopardy Clause precludes retrial where the State has failed as a matter of law to prove its case despite a fair opportunity to do so.

Richardson, 468 U.S. at 327–28 (Brennan, J., concurring in part and dissenting in part) (internal citations and quotation marks omitted). The only meaningful difference between *Burks* and this case is that Carpenter exercised his right to complain that his trial was fundamentally unfair, and the district court agreed. If Carpenter had refrained from filing his new trial motion or the district court had denied it, Carpenter would have received appellate review of his sufficiency

claim and the ability to argue that retrial would violate double jeopardy. The post-*Richardson* consensus in the courts of appeals that retrying Carpenter raises no double jeopardy problem because of "continuing jeopardy" is not required by the reasoning of *Richardson* or the history it cites. And it effectively revives the coercive rule, explicitly rejected by this Court in *Burks*, that a defendant waives his right to complain of evidentiary insufficiency by asking for a new trial. This Court should grant certiorari and adopt a rule that is less arbitrary and more consistent with the underlying purposes of the Double Jeopardy Clause. *See Green*, 355 U.S. at 198

> The right not to be placed in jeopardy more than once for the same offense is a vital safeguard in our society, one that was dearly won and one that should continue to be highly valued. If such great constitutional protections are given a narrow, grudging application they are deprived of much of their significance.

2. Cross-Appeal Jurisdiction Exists Under The Collateral Order And Pendent Appellate Jurisdiction Doctrines

If this Court were to hold that a conviction after full trial terminates the "continuing jeopardy" if the evidence was insufficient, then defendants would clearly be entitled to interlocutory cross-appeals on sufficiency grounds under *Richardson* and *Abney*. Indeed, any even "colorable" double jeopardy claim establishes interlocutory appellate jurisdiction under *Richardson*. *See Richardson*, 468 U.S. at 322. But even if this Court

is not prepared to embrace that constitutional principle, it should nonetheless hold that a defendant in Carpenter's position is entitled to appeal—*at least* if the government takes its own interlocutory appeal under § 3731—as a matter of fairness and prudence. The First Circuit acknowledged the longstanding circuit split on this issue in its decision in this case. The issue is of profound importance to individual defendants and the administration of justice, and merits review.

a. Courts of appeals normally have jurisdiction to consider appeals only from "final decisions" of the district courts. 28 U.S.C. § 1291. In criminal cases, this "final judgment" rule "prohibits appellate review until conviction and imposition of sentence." *Flanagan v. United States*, 465 U.S. 259, 263 (1984). One critical exception to the final judgment rule, however, is that a preliminary or interim decision is appealable as a "collateral order" if it (1) "conclusively determine[s] the disputed question," (2) "resolve[s] an important issue completely separate from the merits of the action," and (3) is "effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978) (citing *Cohen*, 337 U.S. 541).

Since *Cohen*, this Court has allowed interlocutory appeals in criminal cases under the collateral order doctrine in four situations: (i) denial of a motion to reduce bail, *Stack v. Boyle*, 342 U.S. 1, 7 (1951); (ii) denial of a motion to dismiss on double jeopardy grounds, *Abney*, 431 U.S. 651; (iii) denial of a motion to dismiss under the Speech or Debate Clause, *Helstoski v. Meanor*, 442 U.S. 500 (1979); and, most recently, (iv) denial of an objection to a pretrial forced-medication order, *Sell v. United*

States, 539 U.S. 166 (2003). The circuits are divided over whether the collateral order doctrine permits interlocutory appellate review in Carpenter's situation: denial of a motion for judgment of acquittal where the government *first* appeals a new trial order under 18 U.S.C. § 3731.

The First Circuit (App. 27a–28a) has now joined at least the Second, Third, and Seventh Circuits in answering that question in the negative. *See United States v. Ferguson*, 246 F.3d 129, 138 (2d Cir. 2001) ("denial of a Rule 29 motion does not fall within the narrow scope of the collateral order doctrine"); *United States v. Cahalane*, 560 F.2d 601, 608 (3d Cir. 1977) ("Defendants do not have the right to cross-appeal when the Government appeals under 18 U.S.C. § 3731."); *United States v. Eberhart*, 388 F.3d 1043, 1051 (7th Cir. 2004), *rev'd on other grounds*, 546 U.S. 12 (2005) ("The order at issue does not satisfy the latter two elements" of the collateral order doctrine.).

As the First Circuit recognized below, however, the Fourth Circuit has reached the opposite conclusion. That court held that

> [i]f [the defendant] was entitled to a judgment of acquittal, this right is too important to be denied review, particularly since a retrial might result in twice placing him in jeopardy for the same crime. It is also a right that can be irreparably lost if review is postponed until final determination of the case, because by then [the defendant] would have been put

> through the trauma and the expense of another trial.

Greene, 834 F.2d at 89; *see* App. 29a (recognizing conflict). The Fourth Circuit's reasoning is persuasive, and there is a manifest need for the Court to settle this well-established conflict. *See* Sup. Ct. R. 10(a).

b. This Court could also reach a conclusion similar to the Fourth Circuit under the doctrine of pendent appellate jurisdiction, which grants authority to "a court of appeals with jurisdiction over one ruling to review, conjunctively, related rulings that are not themselves independently appealable . . . [where the two rulings are] inextricably intertwined." *Swint v. Chambers County Comm'n*, 514 U.S. 35, 50–51 (1995). *See also* Joan Steinman, *The Scope of Appellate Jurisdiction: Pendent Appellate Jurisdiction Before and After Swint*, 49 Hastings L.J. 1337, 1353 (1998) ("[P]endent appellate jurisdiction allows appellate courts to review issues that lack an independent basis of appellate jurisdiction if they bear a particular relationship to issues for which there is such jurisdiction."). This Court took a narrow view of the doctrine in *Swint*, but acknowledged that its prior cases had permitted the courts of appeals leeway to consider related issues in appropriate circumstances. Whether retrial is appropriate in a criminal case is certainly "inextricably intertwined" with whether the evidence was sufficient to justify conviction, in a practical even if not formal sense.

In *civil* cases, "[t]he Federal Courts of Appeals have endorsed the doctrine of pendent appellate jurisdiction, although they have expressed varying views about when

such jurisdiction is properly exercised." *Swint*, 514 U.S. at 44 n.2. There is a deep conflict among the courts of appeals as to whether the pendent appellate jurisdiction doctrine applies in *criminal* cases, however, and this Court could easily resolve that broader split in the process of considering the doctrine's application in these circumstances.

The Second and D.C. Circuits hold that pendent appellate jurisdiction is never available in criminal cases. *See Ferguson*, 246 F.3d at 138 ("[T]here is no pendent appellate jurisdiction in criminal cases."); *United States v. Hsia*, 176 F.3d 517, 527 (D.C. Cir. 1999) ("[E]ven where the interlocutory appeal is brought by the government, as here, we see no reason to give the defendant a windfall opportunity to delay proceedings via cross-appeal."). The Seventh Circuit has intimated that it would follow that rule: "It is *doubtful* that pendent appellate jurisdiction is available in criminal cases." *Eberhart*, 388 F.3d at 1051 (emphasis added). The Fourth Circuit has questioned whether the doctrine "ever exists." *United States v. Bundy*, 392 F.3d 641, 649 (4th Cir. 2004).

In contrast, the Eleventh Circuit has held that the pendent appellate jurisdiction doctrine applies in criminal cases, and has utilized it to permit interlocutory review of a non-final district court order when the government took a § 3731 appeal in a mail fraud case. *See United States v. Lopez-Lukis*, 102 F.3d 1164, 1167 n.10 (11th Cir. 1997) ("[W]e are confident that our application of pendent jurisdiction is proper in this case."). The Tenth Circuit has also applied the doctrine in a mail and wire fraud case involving an appeal by the government under § 3731, although the decision predates

Swint. *See United States v. Zabawa*, 39 F.3d 279, 283 (10th Cir. 1994) ("We have pendent jurisdiction to review on appeal issues that are otherwise not appealable when raised by an appellant or a cross-appellant."). The First and Sixth Circuits have also rejected particular claims for pendent appellate jurisdiction in criminal cases on the merits, without intimating that the doctrine could never apply in a criminal case. *See United States v. Marino*, 200 F.3d 6, 12–13 (1st Cir. 1999); *United States v. A.R.*, 203 F.3d 955, 962–63 n.4 (6th Cir. 2000). This case provides an appropriate vehicle for this Court to resolve this conflict on such an important issue.

c. All of the policy considerations discussed in Section 1 *supra* that make the constitutional issue debatable—and that have led the courts of appeals to adopt their "prudential" rules requiring panels to reach sufficiency claims after final judgment—support the Fourth Circuit's rule. Furthermore *none* of the policy concerns arguing against interlocutory appeals in criminal cases exist with respect to a defendant's cross-appeal of the denial of a motion for judgment of acquittal *after* the government has already appealed the grant of a motion for a new trial under § 3731. *See Flanagan*, 465 U.S. 269–70 (discussing concerns); *Sell*, 539 U.S. at 188–93 (Scalia, J., dissenting) (discussing concerns).

First, a cross-appeal by a defendant obviously does not "interrupt[] the trial," *Flanagan*, 465 U.S. at 269, because the trial has already been completed and the district court is divested of jurisdiction when the government takes its appeal under § 3731. There is nothing to "interrupt." *See Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982) (per

curiam) ("The filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal."). For the same reason, there is no "concern for the disruption of criminal proceedings." *Sell*, 539 U.S. at 191 (Scalia, J., dissenting).

Second, unlike with interlocutory bail issues where "[t]he prosecution would continue, though only after long delay," *Flanagan*, 465 U.S. at 269, if a court of appeals hears a defendant's cross-appeal and grants the judgment of acquittal, the case is over. And even if the claim is unsuccessful, it does not delay the new trial any more than the government's appeal already has.

Third, "little seems to be gained by examining the sufficiency of the evidence on appeal through the lens of new trial standards but refusing to examine the sufficiency of the same evidence through the lens of acquittal standards." 15B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice & Procedure: Jurisdiction & Related Matters § 3919.7 (2d ed. 2007). A court of appeals confronted with the government's appeal of a new trial order will generally have to engage with the record in any event. And denying a defendant's cross-appeal on sufficiency grounds prior to retrial conserves judicial resources only in an extraordinarily blinkered and obtuse sense. The court of appeals perhaps defers or avoids some analysis, at the expense of putting the defendant, the government, and the district court through a second trial that a timely sufficiency review may prove unnecessary. If the defendant is acquitted at the second trial then the case

may never come back to the court of appeals, but those are precisely the cases in which sufficiency review prior to retrial would serve the interests of justice and judicial economy on the whole. If the defendant is *convicted* on retrial then presumably he will be right back in the court of appeals raising his sufficiency arguments. And one of two things will be true: either the government will put on the same case the second time, in which case the same inevitable sufficiency review could have been conducted just as easily before the retrial; or the government will learn from experience and put on a *better* case the second time, in which case the core values of the Double Jeopardy Clause are plainly implicated. Critically, in that event, the defendant *never* has the chance to challenge on appeal the sufficiency of the evidence introduced at his *first* trial. *See United States v. Julien*, 318 F.3d 316, 321 (1st Cir. 2003) ("We hold that defendant may not, on appeal from a judgment of guilt in a second trial following a mistrial, then raise a claim that he was wrongly denied his motion for acquittal on insufficiency of the evidence at the first trial.").

Fourth, indeed it is the First Circuit's rule that risks wasting judicial resources—by giving the government an entirely risk-free opportunity to take an interlocutory appeal from a district court's order granting a new trial. That "no-lose" scenario in favor of the government constitutes a paradigmatic "moral hazard" whereby the total insulation from risk (i.e., that the government could lose a defendant's challenge to the sufficiency of the evidence on cross-appeal) leaves the government less concerned about the negative consequences of appealing the grant of a new trial than it otherwise might be. In fact, because there is *no* risk to the government in

bringing such an appeal, the moral hazard is that the government will develop an insatiable appetite to pursue interlocutory appeals in *all* cases where the district court grants a new trial.[8] The only guaranteed loser is the defendant, who *at best* will be forced to run the gauntlet a second time, and *at worst* will suffer a reversal of the new trial order, be convicted and sentenced. If the government decides to appeal a district court's new trial order, it should also face appellate scrutiny of the district court's denial of a defendant's motion for judgment of acquittal. "There is no unfairness to the government if it [loses] that gamble." App. 18a.

Finally, the First Circuit's interpretation of §§ 3731 and 1291 effects an undesirable inversion of the historical appellate rights of the government and individual defendants in criminal cases. "[F]rom the time of Lord Hale. . . . the textbooks, with hardly an exception, either assume or assert that the defendant (or his representative) is the only party who can have either a new trial or a writ of error in a criminal case." *United States v. Sanges*, 144 U.S. 310, 312 (1892) (holding that the government cannot take an appeal in a criminal case without express statutory authority). The Criminal

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8. *See* Amitai Aviram, *The Placebo Effect of Law: Law's Role in Manipulating Perceptions*, 75 Geo. Wash. L. Rev. 54, 94–95 (2006) ("Economists long ago noted that third-party actions that reduce a risk to an individual may create an incentive for the individual to take fewer precautions against the same risk, and therefore may lead to an offsetting increase in the risk."); *Pension Benefit Guar. Corp.* v. *LTV Corp.*, 496 U.S. 633, 659 (1990) (Stevens, J., dissenting) (criticizing the lack of "a legitimate curative to the problem of moral hazard").

Appeals Act of 1907, 34 Stat. 1246, gave the government the right to appeal the district court's dismissal of an indictment in limited circumstances. *See generally United States v. Sisson*, 399 U.S. 267, 291–96 (1970) (providing history). Congress later replaced the Act in its entirety with the Criminal Appeals Act of 1970. *See* Title III of the Omnibus Crime Control Act of 1970, Pub. L. No. 91-644, 1970 U.S.C.C.A.N. (84 Stat.) 2206, 2217 (codified as amended at 18 U.S.C. § 3731). The 1984 amendments to that statute for the first time gave the government the right to appeal orders granting a defense motion for a new trial. *See* Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 1984 U.S.C.C.A.N. (98 Stat.) 1837, 2153. Nonetheless, the historical presumption is that "appeals by the Government in criminal cases are something unusual, exceptional, not favored." *Carroll v. United States*, 354 U.S. 394, 400 (1957). Permitting the government to appeal new trial orders while denying defendants parallel appellate consideration of their sufficiency challenges runs counter to the historic values of the criminal law.

This Court should give federal criminal defendants the same appellate rights on interlocutory cross-appeals of denials of motions for judgment of acquittal that Congress thought it so important to give the government on appeals of new trial orders—and for many of the same reasons. Any new rule could be confined to that class of critical cases where (i) the district court grants a defendant's motion for a new trial, (ii) the district court denies a defendant's motion for judgment of acquittal,

and (iii) the government appeals the new trial order.[9] Unlike with respect to attorney disqualification orders as in *Flanagan*, "[t]he costs of such expansion are [small], and the potential rewards are [great]." 465 U.S. at 269.

9. "The proportion of defendants convicted in the Federal courts increased from 81% during 1990 to 90% during 2004. The proportion of convicted defendants who pleaded guilty increased from 87% during 1990 to 96% during 2004." U.S. Dep't of Justice, *Compendium of Federal Justice Statistics*, 2004 2 (December 2006), *available at http://www.ojp.usdoj.gov/bjs/pub/pdf/cfjs0402.pdf* (last visited Oct. 12, 2007). Because 96% of defendants who were convicted pleaded guilty, that means only 4% of defendants who were convicted went to trial. Consequently, the new exception to the final judgment rule that Carpenter proposes will be applicable in, at most, only 4% of the convictions. (The actual number will be a small fraction of 1%, because the vast majority of defense motions for a new trial are *denied* by the district court.).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A — OPINIONS OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DATED JULY 18, 2007

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Nos. 06-1373, 06-1374, 06-1488

UNITED STATES OF AMERICA,

Appellant, Cross-Appellee,

v.

DANIEL E. CARPENTER,

Defendant-Appellee, Cross-Appellant.

Before

Lynch, *Circuit Judge*,
Campbell, *Senior Circuit Judge*,
and Lipez, *Circuit Judge*.

July 18, 2007

LIPEZ, *Circuit Judge*. In an appeal brought by the government, we must decide whether the district court erred when it granted Daniel Carpenter a new trial because the government's use of inflammatory language during its closing and rebuttal arguments prejudiced the jury and denied Carpenter a fair trial. In a cross-appeal, Carpenter asserts that the district court erred in failing

to grant his motion for judgment of acquittal. We affirm the new trial ruling. We conclude that we lack jurisdiction to hear Carpenter's cross-appeal.

I.

A. Factual Background

We briefly rehearse the relevant facts, which are largely undisputed. In October 1998, Daniel Carpenter and Martin Paley formed Benistar Property Exchange Trust Company, Inc. ("Benistar") for the purpose of performing property exchanges pursuant to section 1031 of the Internal Revenue Code, 26 U.S.C. § 1031. § 1031(a)(1) allows a seller of "property held for productive use in a trade or business or for investment" to avoid capital gains on the sales proceeds if they are used to purchase a replacement property meeting the same criteria. In order to qualify, the seller must complete the exchange within 180 days of the original sale and must not take control of the proceeds in the interim, § 1031(a)(3). Accordingly, property owners typically entrust their sales proceeds to a qualified intermediary until they purchase replacement property; Benistar was created to play this role.

Benistar's clients signed standard form agreements providing that property sale proceeds be transmitted by wire or check directly from the closing attorney into a Benistar account. Clients chose between a Merrill Lynch Ready Asset Money Market Account, yielding a 3% return on investment per annum (which allowed clients

to access their funds upon 48 hours' notice), and a Merrill Lynch Investment Account, yielding 6% interest (which required 30 days' notice before funds could be accessed).

According to the agreement between Paley and Carpenter, Paley marketed Benistar's services to clients while Carpenter maintained sole authority over the financial aspects of the business. Carpenter opened two accounts at Merrill Lynch in October 1998: the "B01 account," into which client funds were deposited; and the "B10 account," into which Carpenter transferred client funds which he then invested. When he opened the B10 account, Carpenter characterized his risk tolerance as "aggressive" and he informed Merrill Lynch that he intended to engage in options trading. As is their practice, Merrill Lynch counseled Carpenter on the riskiness of these investments and required him to sign a form acknowledging his understanding of those risks.

From October 1998 until late September 2000, Carpenter transferred funds from the B01 account to the B10 account and traded extensively in stock options. While his trading strategy was successful at first,[1] Carpenter lost significant sums when the stock market began to decline in March 2000. As the market continued to decline thereafter, his Merrill Lynch brokers repeatedly counseled Carpenter to adopt a more conservative trading strategy. After Carpenter sustained roughly $4 million in losses, Merrill Lynch suspended his trading privileges.

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1. Indeed, testimony indicated that, in the fourth quarter of 1999, Carpenter was "up" roughly $800,000.00, providing Carpenter with slightly more than $600,000.00 in profit.

Carpenter then moved his trading activity to PaineWebber, where he again opened linked accounts: client funds were deposited by mail or wire into one account and he engaged in stock option trading from the other account. As had Merrill Lynch, PaineWebber counseled Carpenter on the risks inherent in options trading; Carpenter acknowledged these risks and continued his aggressive investment strategy. Carpenter continued to sustain heavy trading losses at PaineWebber and, despite his broker's urging that he adopt a more conservative investment strategy, Carpenter increased the size and riskiness of his trades as his fortunes declined. PaineWebber discontinued Carpenter's trading privileges in December 2000. Although Benistar had been losing client funds since March 2000, incoming funds had covered the losses. However, by January 2001, Benistar was forced to tell its clients that their money was gone. Benistar subsequently ceased operations, having lost roughly $9 million in client funds.

B. Carpenter's Trial

Carpenter was indicted in February 2004 by a federal grand jury in the District of Massachusetts on fourteen counts of wire fraud, in violation of 18 U.S.C. § 1343, and five counts of mail fraud, in violation of 18 U.S.C. § 1341. In particular, Carpenter was charged with having devised and implemented a scheme to defraud investors by representing that their money would be invested prudently in conformity with the property exchange requirements of the Internal Revenue Code while he

intended to pursue an investment strategy at odds with such representations. Critically, clients transferred funds to Carpenter and Benistar by mail and wire in response to the investment scheme. Because both mail and wire fraud require an intent to defraud, the trial focused largely on Carpenter's state of mind when he obtained the funds of Benistar's clients through the representations made to them.

In his defense, Carpenter portrayed his lack of interaction with clients and his lack of knowledge about Benistar's promotional materials. He contended that any assurances made to clients about the risks to their funds were made by Paley alone and without his knowledge.[2] In addition, Carpenter emphasized that the client agreements placed no restrictions on how funds would be managed in order to produce the 3% or 6% return selected by the clients. Carpenter argued that he never misled clients into believing their funds would be safe. Rather, he insisted that he acted with the good faith belief that he had unfettered discretion to invest client funds. He attributed Benistar's losses not to an unwise trading strategy but to a generalized stock market crash well beyond his control.

The government focused on the incongruity between the nature of a § 1031 property exchange (a transaction

2. Paley provided extensive documentary evidence and deposition testimony to the government as it built its case. He also testified as a witness against Carpenter at trial. No criminal charges were brought against Paley in connection with this wire and mail fraud scheme.

structured to avoid capital gains while allowing investors to use the proceeds of one property sale to purchase a replacement property within a short period of time) and the aggressive nature of Carpenter's investment behavior. It contended that this incongruity demonstrated Carpenter's intent to mislead Benistar's clients into depositing their real estate proceeds with a supposedly safe intermediary so that he could leverage the funds into a substantial profit for himself through risky options trading. To prove this agenda, the prosecution sought to introduce extensive evidence regarding Carpenter's investment behavior, relying chiefly on testimony from his brokers at Merrill Lynch and PaineWebber.

Carpenter's counsel objected to such evidence before its introduction and throughout the trial, arguing that testimony regarding Carpenter's trading strategy and losses was both irrelevant to establishing his state of mind at the time he obtained client funds and also highly prejudicial. The court denied counsel's motions in limine and his repeated objections, ruling that the brokers could testify as to factual matters for the limited purpose of allowing the jury to "consider[ ] the historical fact of the kind of trading that was done so the jury can decide . . . whether [Carpenter] had the requisite criminal state of mind" when investors were assured that their funds would be kept safe. The court also determined that, because no foundation had been laid to treat them as experts, these witnesses could not provide opinion testimony. In addition, the court repeatedly expressed its concern that such evidence not be used to distract

the jurors from the elements of the charged offenses of mail and wire fraud. These witnesses's testimony dominated three of the ten days of Carpenter's trial.

During its closing and rebuttal arguments,[3] the government emphasized that the riskiness of Carpenter's trading strategy conflicted with the purposes for which Benistar's clients entrusted their money to Carpenter's management. In making this argument, the government embellished its description of Carpenter's trading strategy with gambling metaphors and terminology intended to show Carpenter's recklessness.

A jury convicted Carpenter on all counts. Shortly thereafter, Carpenter filed motions for a new trial under the Federal Rules of Criminal Procedure 33(b)(2) and for judgment of acquittal under Rule 29(c), each raising several grounds. The district court granted the motion for a new trial, ruling that the government's repeated use of gambling metaphors during its closing arguments "may [ ] have induced a verdict based on the jury's moral disapproval of the 'gambling' " rather than on the jury's conclusion that Carpenter had committed mail and wire fraud. *United States v. Carpenter,* 405 F.Supp.2d 85, 102 (D.Mass.2005). The court denied the motion for acquittal and subsequently denied Carpenter's motion for reconsideration. The government appealed the new trial

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3. The closing and rebuttal arguments will be referred to hereinafter as "the closing arguments."

ruling pursuant to 18 U.S.C. § 3731[4] and Carpenter filed a cross-appeal, arguing that the court wrongly decided his motion for acquittal.

II.

A. The Motion for a New Trial

The government contends that the district court abused its discretion in granting the motion for a new trial because: (1) it did not apply plain error review despite Carpenter's failure to object to the government's use of gambling metaphors until after the jury delivered its verdict; (2) the government's references to gambling were not improper under any standard; and (3) even if the gambling references were improper, they did not amount to a "miscarriage of justice," warranting a new trial. *England v. Reinauer Transp. Cos.*, 194 F.3d 265, 270 (1st Cir.1999) (citing *Conway v. Electro Switch Corp.*, 825 F.2d 593, 598-99 (1st Cir.1987)). We consider these arguments in turn.

1. Preservation of Carpenter's Objection

The government argues that because Carpenter did not contemporaneously object to the government's use of gambling metaphors during its closing arguments, the district court should have reviewed the motion for a new

4. We note that the government's ability to appeal the district court's grant of a motion for a new trial is a relatively recent phenomenon, arising from the 1984 amendments to § 3731.

trial based on those arguments for plain error.[5] Although the government pressed this same plain error argument before the district court, the court did not expressly address the argument in its opinion ordering a new trial. Nevertheless, as we shall explain, the court's opinion can only be read as an implicit determination that Carpenter preserved his objection to the closing arguments.

The government concedes that Carpenter moved in limine and made several trial objections to the introduction of testimony related to Carpenter's investment strategy and losses. However, the government argues that these objections were insufficiently specific, and that they addressed only the *admission* of evidence and not the manner in which the government could *argue from* that evidence during its closing and rebuttal.

Historically, when a party's motion in limine to exclude evidence had been denied, the party's failure to renew the objection at trial was considered "fatal." *E.g., United States v. Vest,* 842 F.2d 1319, 1325 (1st Cir.1988). However, Federal Rule of Evidence 103(a) was amended in 2000 to read, in pertinent part: "[o]nce the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal." The accompanying commentary explains that "[w]hen the ruling is definitive, a renewed objection or offer of proof at the

5. The parties agree that the court did not apply plain error review.

time the evidence is to be offered is more a formalism than a necessity." Fed.R.Evid. 103 advisory committee's note, 2000 Amendment. In applying this rule, we must pay particular attention to the question whether the trial court made "definitive" rulings on the motion in limine. *Crowe v. Bolduc*, 334 F.3d 124, 133-34 (1st Cir.2003).

Carpenter repeatedly objected to the introduction of evidence regarding his trading strategy and losses, arguing that it was irrelevant and overly prejudicial because it distracted the jury's attention from whether he intended to defraud Benistar's clients at the time their funds were solicited, and focused their attention instead on the sagacity of his investment strategy. Indeed, before the trial even began, Carpenter moved in limine to preclude the testimony of the Merrill Lynch and PaineWebber brokers based on irrelevance and undue prejudice. He also argued that, because they had not been identified as expert witnesses, the brokers should not be allowed to give any evaluative opinions about his trading strategy.

The court found Carpenter's arguments somewhat persuasive, ruling on the motion in limine that the "jury may take account of what kind of trading was done in evaluating whether there was a culpable state of mind. . . . but evaluative opinions about the nature of the trading from people who have not been identified as [expert] witnesses will not be permitted." In addition, the court stated that "it would be appropriate to caution the jury in [its] instructions to stay on the elements of the offenses that are charged and not imagine other

wrongs." The court added: "[w]hen we've seen all the evidence, we'll have a clearer idea of what to do on that subject."

Despite the court's preliminary ruling on his objection to the brokers' testimony, Carpenter continued to object to that testimony to assure the preservation of his objection. For instance, at the end of the first day of broker testimony, Carpenter's counsel stated: "I just want to preserve my objection because I don't know if I preserved [it] adequately in terms of all the testimony that came in. . . . [I]t's the same issue, but I didn't want to stand up every time." The court responded: "I think your objection is preserved."

At the conclusion of the Merrill Lynch brokers' testimony, Carpenter filed a motion for mistrial, arguing that he had been "irretrievably prejudiced in front of the jury by the [testimony of the] Merrill Lynch witnesses that he was an aggressive speculator[,] river boat gambler." The court denied Carpenter's motion for a mistrial, explaining: "I adhere to the ruling that permitted the admission of the evidence in advance. I understand the point. We'll deal with it at some additional occasions." When Carpenter's counsel asked for a "running objection in line with the motion [for a mistrial]. . . . So I don't have to stand up," the court responded: "You're covered under Rule 103." The recognition of a continuing objection could not be clearer.

After Carpenter received that assurance, the government presented two expert witnesses who

testified regarding Carpenter's investment strategy. In a motion in limine seeking to preclude the testimony of the second expert, Marc Allaire, Carpenter argued: "the jury has already heard sufficient evidence regarding the rudiments of options investments. . . . Any further testimony by Allaire on this issue would simply be cumulative, unhelpful and a waste of time." Although the court rejected the motion in a ruling from the bench, it reiterated its concern for

> making sure that the jury at the appropriate time is focused on the elements of the offense and what needs to be proved. And I agree that to some degree this is all relevant as to state of mind, but I'm concerned that the more the wisdom of the trading strategy gets debated, the more the jury will think that has greater significance than maybe it does in their deliberations. . . . I want to keep this focused on whether there was an intent to deceive or specific intent to defraud.

Carpenter's counsel persisted, stating: "I'm not going to belabor the point, your Honor. . . . I would just preserve the issue." The court responded: "Okay. All right." After Allaire's testimony, the court heard a final day of testimony focused primarily on establishing the authenticity of the actual mail and wire transfers of funds from Benistar's clients into the Benistar account. The parties then presented their closing arguments the next day.

Thus, the trial court devoted considerable attention to the contested evidence throughout the trial, fielding repeated objections and stressing its concern that the government limit its use of the evidence to illuminating Carpenter's intent. Placed in this context, we find unpersuasive the government's attempt to distinguish between the introduction of the evidence covered by Carpenter's objections at trial and the prosecution's arguments from that evidence, to which Carpenter did not specifically object before jury deliberations. We look in vain for any indication that the government drew this distinction in its written submission to the district court in opposition to Carpenter's motion for a new trial. More importantly, even if this distinction was discernible in the government's opposition, the district court was entitled to reject it and conclude that Carpenter's continuing objections to the admission of evidence about his investment strategy and losses applied as well to the government's closing arguments based upon that evidence.[6] Hence we reject the government's argument

6. The dissent argues that we should not infer that the court ruled that defendant preserved his objection to the government's use of gambling metaphors in its closing arguments and that the plain error standard did not apply to the request for a new trial based on the closing arguments. However, the government explicitly argued for plain error review in its written opposition to Carpenter's motions for judgment of acquittal and a new trial. The court issued a lengthy published decision on these motions, addressing each of Carpenter's arguments in detail, including the argument that the court entitled in its decision "Prejudicial Inflammatory Argument" (a reference to the gambling metaphors). In explaining its decision to grant a new trial because of this inflammatory argument, the

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that the district court erred in failing to apply plain error review to the government's new trial motion.

The dissent disagrees with this conclusion, asserting that the district court had to apply the plain error standard to the defendant's motion for a new trial because Carpenter failed to preserve his objection to the government's use of gambling metaphors in its closing

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court explained its decision in harmless error terms: "Because it cannot be said with confidence that the government's improper closing arguments did not taint the verdict, the verdict cannot be allowed to stand." This language echoes other decisions on new trial motions that have evaluated whether the interest of justice requires a new trial under the harmless error standard. *See, e.g., United States v. Casas*, 425 F.3d 23, 38 (1st Cir.2005) (assessing whether trial error affected the trial's outcome); *United States v. Hodge-Balwing*, 952 F.2d 607, 610 (1st Cir.1991) (same); *United States v. Capone*, 683 F.2d 582, 585-86 (1st Cir.1982) (same). Given the thoroughness of the court's decision, including its explanation of the reasons for granting a new trial, we can only conclude that the court did not apply plain error review because it consciously rejected the government's plain error argument. Moreover, even if the district court had satisfied the dissent's insistence on an explicit ruling rejecting the plain error standard, the dissent would still deem that ruling a legal error. The dissent's central concern is not the adequacy of the court's explanation of its decision to apply the harmless error standard. Instead, the dissent argues that the district court could not apply the harmless error standard because, as a matter of law, the defendant did not preserve his objection to the government's use of gambling metaphors in its closing arguments. As we explain more fully, that argument misperceives the standard of review that an appellate court should apply to a trial court's preservation ruling.

arguments. This assertion reflects the dissent's unstated premise that appellate review of the trial court's preservation determination is de novo. That is not the law. Instead, the appellate court should defer to such a preservation ruling by the district court. The preservation requirement has two components: alerting a trial judge to a party's objection to a ruling or to the admission of evidence and adequately explaining the basis for that objection. *See Estate of Keatinge v. Biddle*, 316 F.3d 7, 15 (1st Cir.2002). Thus advised, the trial judge can decide what course of action to take to assure, so far as possible, the legal correctness of the trial proceedings. *Id.* Faced with post-trial arguments debating whether an objection to evidence or arguments was adequately preserved, it is certainly the trial judge who is in the best position to decide if she sufficiently understood that an objection had been made and the grounds for it. Given that reality, the appellate court should defer to the trial court's preservation ruling.[7] The dissent rejects such

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7. We routinely defer to the trial court when it is better positioned to assess the relevant factors for making particular kinds of decisions. *See, e.g., Castro v. Chicago Hous. Auth.*, 360 F.3d 721, 735 (7th Cir.2004) (deferring to trial court's evaluation of party's motion practice); *United States v. Capelton*, 350 F.3d 231, 238 (1st Cir.2003) (applying abuse of discretion standard to trial court's ruling on a motion for mistrial); *Ferrara & DiMercurio v. St. Paul Mercury*, 240 F.3d 1, 13 (1st Cir.2001) (deferring to trial court's determination whether misconduct occurred and whether it required judicial sanction); *United States v. Dumas*, 207 F.3d 11, 16 (1st Cir.2000) (deferring to trial court's assessment of witness credibility); *United States v. Gonzalez-Maldonado*, 115 F.3d 9, 20 (1st Cir.1997) (deferring to trial court's determination of evidence's relevance).

deference in favor of a de novo standard of review which fails to account for the trial court's superior position to determine whether it has been properly apprised of an objection.

In addition, contrary to the suggestion of the dissent, there is no rule that preserved objections to the admission of evidence cannot also cover closing arguments based upon that testimony. Here, in evaluating defendant's demand for a new trial on the basis of gambling metaphors in the government's closing arguments, the district court could reasonably conclude that the defendant's strenuous objections to the evidence on trading strategy and losses embraced the gambling metaphors that characterized that evidence in such provocative terms in the government's closing arguments.

The dissent cites unfairness to the government in the district court's new trial ruling. Specifically, the dissent speculates that "had there been a cognizable objection here, the government would likely not have to retry the case, and the considerable burdens of a retrial would not be placed upon witnesses and alleged victims." Once again the dissent refuses to acknowledge the superior position of the district court to determine, from its vantage, that the defendant had already registered a cognizable objection to the government's use of gambling metaphors through its repeated objections to the evidence underlying those metaphors.

However, there was always the risk for the government that the court, in the context of a post-trial motion for a new trial, would reconsider the appropriateness of its handling of the evidence and arguments on trading strategy and financial losses. That risk emphasizes why there is no unfairness to the government in the court's decision to award a new trial. As we have already noted, after one of its rulings admitting evidence on trading strategy and losses, the court stated that "it would be appropriate to caution the jury in [its] instructions to stay on the elements of the offenses that are charged and not imagine other wrongs." The court expressed similar concerns on other occasions about the potential for the unfairly prejudicial impact of this evidence on the jury. Yet, as we explain more fully in the next section of the opinion, the government ignored the court's concerns about the limited relevance of the trading strategy and financial losses evidence. Instead of engaging in a straightforward explanation of the relevance of that evidence to the defendant's criminal intent, the government used provocative gambling metaphors to characterize that evidence. This calculated decision by the government increased the risk that the court, in evaluating a post-trial motion for a new trial, would conclude that this provocative treatment of the potentially unfairly prejudicial evidence made this prejudice real and required a new trial in the interest of justice.

The government cannot claim surprise in such a ruling. When it resorted to the gambling metaphors in its closing arguments, the government made its own

gamble that the court, despite its uneasiness about the potential prejudicial impact of the evidence of trading strategy and financial losses on the jury, would not conclude, in evaluating the inevitable motion for a new trial, that the government had gone too far with its arguments. There is no unfairness to the government if it has now lost that gamble.

2. Propriety of Gambling Metaphors in Closing

We must now decide if the district court was correct in ruling that the government had gone too far with the many gambling references during its closing arguments. Although we employ the deferential abuse of discretion standard in reviewing the district court's ultimate determination that the prosecution's inflammatory statements warrant a new trial, we must review de novo the prior question of whether the comments themselves were improper. *United States v. Hernandez*, 218 F.3d 58, 68 (1st Cir.2000) (reviewing de novo whether prosecutor's statements during closing arguments were improper because they relied on evidence related to activities outside the scope of the alleged conspiracy to prove a criminal association); *United States v. Lewis*, 40 F.3d 1325, 1337-38 (1st Cir.1994) (applying de novo review to determine the propriety of prosecutor's comments during closing arguments that the defense had failed to produce evidence regarding an alleged "frame up"); *United States v. Glantz*, 810 F.2d 316, 320-21 & n. 2 (1st Cir.1987) (acknowledging that a de novo standard of review applies to the legal question of whether the prosecutor's arguments were proper, but determining

that the court need not decide propriety where it finds that the grant of a new trial on the basis of such arguments was an abuse of discretion even if the arguments were improper).

The district court acknowledged that the "gambling characterizations were not, as a matter of the narrative of the government's case, wholly inapt," 405 F.Supp.2d at 101. However, it found that the "repeated references to gambling were intended to, and did, inflame the jury's passions against the defendant," *id.* We agree.

In assessing whether the use of particular language is improper, we look beyond the technical accuracy of a phrase and consider such factors as the "threat of unfair prejudice, frequency of use, and alternative means of description." *United States v. Felton*, 417 F.3d 97, 103 (1st Cir.2005). The prosecution's use of gambling language was extensive. The district court counted eighteen instances in which the government used some permutation of the word "gamble," along with numerous references to other gambling terms. 405 F.Supp.2d at 101. The government referred to gambling in its morally freighted gaming sense, with provocative references to "cashing in chips," "doubling down" and "river boat gambler." In a particularly dramatic example, the prosecution intoned:

> Any reasonable person with or without investment experience and knowledge would have said it's time to cash in my chips and go home. Not Dan Carpenter. He kept on

> playing. . . . The self-professed river boat gambler pushes on until the losses mount and mount and mount.

Finally, we are most concerned that the government would use such provocative language in the face of the court's repeated caution that the evidence upon which the gambling terminology was based should not be used to distract the jury from its focus on Carpenter's state of mind when he obtained his clients' funds. We cannot ignore this important context in evaluating the choices the prosecution made when it crafted its closing arguments.

While we agree that "a criminal defendant is not entitled 'to a prosecutorial summing-up confined to platitudes and euphemisms,' " *United States v. Rodriguez-Estrada*, 877 F.2d 153, 159 (1st Cir.1989) (quoting *Palmariello v. Sup't of MCI Norfolk*, 873 F.2d 491, 494 (1st Cir.1989)), we must also ensure that "while a prosecutor 'may strike hard blows, he is not at liberty to strike foul ones,' " *United States v. Taylor*, 54 F.3d 967, 977 (1st Cir.1995) (quoting *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935)). Because the government repeatedly referred to gambling in a pejorative sense in its closing arguments, despite the district court's explicit warning against distracting the jurors from the elements of the crimes charged, we agree with the district court that the prosecutor's gambling arguments were improper.

3. Grant of a New Trial

Before granting a new trial based on a prosecutor's improper comments in a closing argument, a court must "determin[e] 'whether [those comments] ha[ve] so poisoned the well that a new trial is required,' " *United States v. Robinson*, 473 F.3d 387, 398 (1st Cir.2007). In so doing, the court considers such factors as: (1) the extent of the improper remarks, (2) the context, (3) the likely effect of any curative instructions given by the judge, and (4) the weight of the evidence against the defendant. *Id.* (citing *United States v. Casas*, 425 F.3d 23, 38 (1st Cir.2005)). However, these factors are not exhaustive; they are meant merely to guide the court's inquiry into whether the prosecutor's improper comments have undermined the fairness of the trial.

In assessing the extent to which the improper arguments affected the outcome of the trial, the district court focused on the frequency with which the gambling references were made, their "persistently pejorative" nature and their "tendency to lead the jury away from the charges in the indictment by inviting them to blame Carpenter because he was a gambler, or because he lost the exchangors' money, rather than because he had committed mail or wire fraud." 405 F.Supp.2d at 102.

The court also emphasized the context in which those comments were made, noting that it had admitted the evidence from which these gambling metaphors were drawn for a "limited purpose," and observing that "this evidence was introduced in the latter stages of the

government's case, close in time to the closing arguments. As the arguments were made, this evidence likely remained vivid in the jurors' memories." *Id.* Placed in this context, the court concluded: "Condemning Carpenter for 'gambling,' as the prosecutors persisted in doing, was an appeal to instincts of moral disapprobation about recklessness, waste, and perhaps even theft." *Id.*

After highlighting the improper nature of the government's arguments, the court related those arguments to the overall strength of the government's case:

> though sufficient to withstand a motion for judgment of acquittal, the case was not so strong that it can confidently be said that the repeated 'gambling' references had no illegitimate effect on the jury's assessment of the evidence. On what was perhaps the crucial issue, the jury would certainly have been warranted in concluding beyond a reasonable doubt that Carpenter acted with intent to defraud, but a contrary conclusion also would have been rationally possible on the evidence.

Id. at 103. The court concluded: "Because it cannot be said with confidence that the government's improper closing arguments did not taint the verdict, the verdict cannot be allowed to stand." *Id.*

We afford the district court substantial deference in such an assessment, reflecting the trial judge's familiarity with the case. The "trial judge 'has listened to the tone of the argument as it was delivered and has observed the apparent reaction of the jurors. In short, he is far more "conversant with the factors relevant to the determination" than any reviewing court can possibly be.' " *Glantz*, 810 F.2d at 320 n. 2 (quoting *Arizona v. Washington*, 434 U.S. 497, 514, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978)). We find no basis for concluding that the district court abused its discretion in ordering a new trial.[8]

B. The Motion for Judgment of Acquittal

In his cross-appeal, Carpenter contends that the district court erred in denying his motion for judgment of acquittal because the government failed to present sufficient evidence on the mail and wire fraud charges to permit a reasonable jury to convict him. Before we may reach the merits of Carpenter's cross-appeal, we face the threshold question of our jurisdiction. Carpenter urges us to assert jurisdiction over his cross-appeal under the so-called "collateral order" doctrine, in order to protect his right to be free from double jeopardy and as a matter of judicial economy.

Although 28 U.S.C. § 1291 specifies that our jurisdiction extends only to appeals from "final decisions

8. Our agreement with the district court's grant of a new trial because of gambling metaphors obviates any need to address the alternative bases Carpenter asserted in his motion for a new trial.

of the district courts," the Supreme Court, in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949), identified a "small class . . . [of] claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."

The Court has since held that "a pretrial order denying a motion to dismiss an indictment on double jeopardy grounds . . . fall[s] within [this] 'small class of cases.' " *Abney v. United States*, 431 U.S. 651, 659, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977). There, the Court relied upon the finality of the district court's action—there being "no further steps that can be taken in the District Court to avoid the trial the defendant maintains is barred by the Fifth Amendment's guarantee," *id.*—and the fact that the "elements of [his double jeopardy] claim are completely independent of his guilt or innocence," *id.* at 660, 97 S.Ct. 2034. The court also emphasized that "even if the accused is acquitted, or, if convicted, has his conviction ultimately reversed on double jeopardy grounds, he has still been forced to endure a trial that the Double Jeopardy Clause was designed to prohibit." *Id.* at 662, 97 S.Ct. 2034.

Carpenter argues that the refusal to consider his cross-appeal would force him "to endure the personal strain, public embarrassment, and expense of a [second] criminal trial," which *Abney* sought to avoid. *Id.* at 661, 97 S.Ct. 2034. With this language, Carpenter invokes the

principle of double jeopardy. *See Green v. United States*, 355 U.S. 184, 187-88, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957) ("[T]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."). In addition, he claims that our refusal to hear a sufficiency claim in these circumstances would burden defendants with a "Hobson's choice" between: (1) waiving the right to move for a new trial in order to ensure appellate review of a sufficiency claim; and (2) moving for a new trial and losing the right to appeal a sufficiency claim arising from the first trial. Carpenter further argues that considerations of judicial economy support our review because we must review the trial record in any event to assess the government's appeal of the new trial ruling.

While Carpenter's assertions have practical appeal, they run afoul of most of the relevant precedent. As we have recognized elsewhere, *Abney* "is not carte blanche authority for all interlocutory appeals brought under the Double Jeopardy banner, since some such claims do not meet the requirements of the 'collateral order' doctrine." *United States v. Ramirez-Burgos*, 44 F.3d 17, 18 (1st Cir.1995). In order to qualify for review under the collateral order doctrine, the collateral issue must:

> (1) [be] so conceptually distinct from other issues being litigated in the underlying action

> that an immediate appeal would neither disrupt the main action, nor threaten to deprive the appellate court of useful context which might be derived from subsequent developments in the litigation; (2) completely and conclusively resolve the collateral issue; (3) infringe rights which appellant could not effectively vindicate in an appeal after final judgment in the case; *and* (4) involve an important or unsettled legal issue, rather than merely challenge discretionary trial court rulings.

United States v. Kouri-Perez, 187 F.3d 1, 5 (1st Cir.1999). We have emphasized that "all four of [these] criteria must be met for there to be jurisdiction under this exception to § 1291 finality." *In re Licht & Semonoff*, 796 F.2d 564, 571 (1st Cir.1986).

In *Richardson v. United States*, 468 U.S. 317, 325, 104 S.Ct. 3081, 82 L.Ed.2d 242 (1984), the Supreme Court reasoned that "the protection of the Double Jeopardy Clause . . . applies only if there has been some event, such as an acquittal, which terminates the original jeopardy." Guided by this principle, the Court went on to determine that a mistrial was not a jeopardy-terminating event and thus a second trial was not barred even if there had been insufficient evidence to convict at the first trial. *Id.* at 326, 104 S.Ct. 3081.

We extended this logic to the vacatur of a conviction on appeal for legal error in *United States v. Porter*, 807

F.2d 21, 24 n. 2 (1st Cir.1986), stating: "where the first conviction was vacated for legal error, not insufficiency of evidence, the concept of continuing jeopardy rules out a double jeopardy claim based on purported insufficiency of evidence at the first trial." Thus, a defendant who succeeds on appeal in demonstrating that he is entitled to a new trial because of error at his first trial may not assert a double jeopardy bar to retrial. As his original jeopardy has not yet ended, there is no double jeopardy to avoid.

It is a short step from *Porter* to the case before us, where the trial court itself ordered a new trial on the basis of legal error. *Porter* teaches that a defendant has no double jeopardy claim when his conviction has been vacated for legal error. *Id.* at 24. That is what occurred here. Although Carpenter's conviction was undone by the trial court rather than on appeal, this is a distinction without a difference.

Without a viable double jeopardy claim, Carpenter has no double jeopardy "right" that he cannot effectively vindicate if he is not permitted to challenge the sufficiency of the evidence in this appeal. Hence he cannot meet the third criterion of the collateral order doctrine.[9] The Second and Seventh Circuits have

9. It is important to understand that Carpenter, in pursuing his cross-appeal, has invoked the principle of double jeopardy in the service of his primary argument that we should review the sufficiency of the evidence argument he makes in his cross-appeal. That is, Carpenter did not file a motion in the trial court

(Cont'd)

similarly found no jurisdiction to hear cross-appeals of a denial of a motion for judgment of acquittal under the collateral order doctrine where the district court's order of a new trial vacated the underlying conviction. *United States v. Eberhart*, 388 F.3d 1043, 1051 (7th Cir.2004), rev'd on other grounds, 546 U.S. 12, 126 S.Ct. 403, 163 L.Ed.2d 14 (2005); *United States v. Ferguson*, 246 F.3d 129, 138 (2d Cir.2001).

Carpenter claims support for his cross-appeal in three decisions from other circuits: *United States v. Greene*, 834 F.2d 86 (4th Cir.1987); *United States v. Wood*, 958 F.2d 963 (10th Cir.1992); and *United States v. Gotti*, 451 F.3d 133 (2d Cir.2006). Only *Greene* supports his position, and we decline to follow it.

(Cont'd)

arguing that his retrial was barred by the principle of double jeopardy. Indeed, there was no basis for any such argument. Hence, we are not reviewing a double jeopardy ruling by the trial court, or a claim that such a double jeopardy ruling itself falls within the collateral order doctrine. Instead, Carpenter uses double jeopardy principles to address the third element of the collateral order doctrine—namely, that the failure to address the collateral issue on appeal (here, sufficiency of the evidence) will infringe rights which appellant could not effectively vindicate in an appeal after final judgment in the case. Carpenter argues that, if the trial judge ruled incorrectly on his motion for judgment of acquittal, and if we failed to assess that possibility by hearing his cross-appeal, his retrial would infringe his double jeopardy right. However, as we have now shown, Carpenter misconstrues the nature of his double jeopardy right, and hence he cannot meet the third criterion of the collateral order doctrine.

In *Greene*, after the trial court ordered a new trial and denied Greene's motion for acquittal, the government appealed the new trial grant. Greene cross-appealed, arguing that the district court erred when it rejected his claim that the evidence was not sufficient to convict him and that to require another trial would violate his right not to be placed in jeopardy twice for the same offense. *Greene*, 834 F.2d at 87. While acknowledging that the "denial of a motion for judgment of acquittal prior to entry of a judgment or sentence [is] normally not reviewable in the Court of Appeals," the court determined that it "would be unfair to apply such a rule in the present proceedings." *Id.* at 89.

Neither *Wood* nor *Gotti* reaches such a result. In *Wood*, the trial court ordered a new trial and denied Wood's motion for judgment of acquittal. The government appealed the grant of a new trial, and Wood cross-appealed the denial of his motion for acquittal contending that double jeopardy barred his retrial. *Wood*, 958 F.2d at 965. Wood's double jeopardy claim was also based on the insufficiency of the evidence at his trial. *Id.* at 967. On the government's motion to dismiss the cross-appeal for lack of jurisdiction, the Tenth Circuit denied the motion and asserted jurisdiction over Wood's cross-appeal because it found a "colorable double jeopardy claim" giving rise to jurisdiction under the collateral order doctrine, *United States v. Wood*, 950 F.2d 638, 643 (10th Cir.1991). However, in its subsequent ruling, it affirmed the new trial grant and ultimately ruled that the double jeopardy claim lacked merit for many of the same reasons that we cite here, given that

the district court had granted defendant's motion for a new trial, *Wood* 958 F.2d at 970-71.[10] Notably, the court further concluded that its "resolution of the merits of Defendant's claims makes future double jeopardy claims like Defendant's non-colorable and, therefore, subject to summary dismissal when asserted on an interlocutory appeal." *Id.* at 972 n. 12.

In *Gotti*, there was no motion for judgment of acquittal based on insufficiency of the evidence in his first trial. Indeed, the jury had not convicted Gotti on any of the charges against him. *Gotti*, 451 F.3d at 135. Instead, it acquitted him on one charge and divided on others, resulting in the declaration of a mistrial on those charges. *Id.* The district court then denied Gotti's post-trial motion to bar a retrial on two of the counts on double jeopardy grounds. *Id.* at 135-36. Gotti then sought interlocutory review of that double jeopardy ruling itself. *Id.* at 136. There was no appeal by the government of any trial court ruling and no cross-appeal by Gotti trying to challenge a trial court ruling on a motion for judgment of acquittal. Citing *Abney*, the Court of Appeals analogized the trial court's double jeopardy ruling to a court's denial of a pretrial motion to dismiss counts of an indictment on double jeopardy grounds and concluded that this ruling met the requirements of the collateral order doctrine. *Id.* In addressing the merits of Gotti's

10. For example, the court emphasized that Wood could not be at risk of double jeopardy where his original jeopardy had not yet ended. 958 F.2d 963 at 970 (explaining that "[a] guilty verdict by a jury which is set aside by the district court on a motion by the defendant does not terminate jeopardy.").

double jeopardy argument, it rejected that argument on very different grounds than those Carpenter raises in asking us to hear his cross-appeal.[11] *Id.* at 136-37. Moreover, as noted, the "merits" issue on appeal in *Gotti* was the trial court's double jeopardy ruling itself. Here the "merits" issue in the cross-appeal is the trial court's ruling on the sufficiency of the evidence. *Gotti* has scant relevance to our application of the collateral order doctrine to that sufficiency ruling.

To the extent that Carpenter makes a judicial efficiency argument that is independent of the collateral order doctrine, we reject that argument as well. Carpenter's primary efficiency argument—that granting appellate jurisdiction over the cross-appeal makes "practical sense" because "given the government's appeal, the Court will now conduct a thorough review of the trial record in this case"—is beside the point. We are not at liberty to go beyond the established criteria of the collateral order doctrine to create new exceptions to the finality requirements of § 1291. Indeed, Carpenter's argument that we should consider his sufficiency claim as we consider the government's appeal

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11. Gotti argued that because the jury could not unanimously agree that the government had proved two predicate racketeering acts with which he was charged, he was entitled to acquittal on the RICO charges against him and could not be retried on any of the charges. The court rejected Gotti's "extraordinary argument," noting that "[o]n this reasoning, juror disagreement as to the proof of a predicate act could *never* result in a hung jury," and that "[t]he government is permitted to retry a defendant following a mistrial resulting from a hung jury." 451 F.3d at 136-37.

runs directly counter to the first criterion of the collateral order doctrine, which requires that the collateral issue (here, sufficiency) be "conceptually distinct" from the issues in the underlying action. *Kouri-Perez*, 187 F.3d at 5. Of course, Carpenter's sufficiency arguments are deeply entwined with the merits of the mail and wire fraud charges that constitute the underlying action.

In addition, even if we could recognize such an efficiency exception, any efficiency gains promised by Carpenter are illusory because there is little comparability between the review that we have had to conduct in our deferential review of the new trial grant and the de novo review we would have to conduct to evaluate the sufficiency of the evidence. In his sufficiency challenge, Carpenter raises arguments of causation, intent, constructive amendment of the indictment, reliance upon a theory of liability based on omission, good faith as an absolute defense, and venue. We have not had to address any of those issues in order to evaluate the district court's new trial ruling.

Carpenter raises a second argument under the banner of efficiency. If we deny appellate jurisdiction over his cross-appeal, he says, and reverse the district court's grant of a new trial, we will have to conduct a second review of the trial record at a later point in time after Carpenter is sentenced and files a direct appeal. Thus, Carpenter contends, granting jurisdiction to hear the cross-appeal at this point will "conserve judicial resources." However, the subsequent direct review of

the issues now raised in the cross-appeal would not represent a "second review" of the trial record because, as we have already noted, our review of the new trial ruling has not required us to review the portions of the record relevant to the issues raised in the cross-appeal. More importantly, Carpenter's second efficiency argument betrays his frontal challenge to the most basic precepts of the final judgment rule. If we were to reverse the trial court's new trial ruling, there would be no final judgment until Carpenter had been sentenced after a remand. *See Berman v. United States*, 302 U.S. 211, 212, 58 S.Ct. 164, 82 L.Ed. 204 (1937) ("Final judgment in a criminal case means sentence. The sentence is the judgment."); *United States v. Leichter*, 160 F.3d 33, 35 (1st Cir.1998). We are not at liberty to disregard such well-established final judgment rules in pursuit of a false efficiency.

III.

For the reasons described above, we *affirm* the district court's grant of a new trial. We *dismiss* the cross-appeal for lack of jurisdiction.

So Ordered.

LYNCH, *Circuit Judge*, concurring. A trial judge may grant a new trial only "if the interest of justice so requires." Fed.R.Crim.P. 33(a). The power is used sparingly. But it may be triggered by a myriad of circumstances. Rule 33 wisely does not attempt to characterize those circumstances so as to limit a trial judge's authority to rule on a timely motion for a new trial.

Here, the trial judge concluded that the jury may well have been diverted from its task of determining whether the government had proven beyond a reasonable doubt each of the elements of the charged offenses. *United States v. Carpenter*, 405 F.Supp.2d 85, 102 (D.Mass.2005). The judge found that the government's case was not so strong that it could confidently be said that the repeated gambling references had no illegitimate effect on the verdict. *Id.* at 103. The court held that because it was possible that the government's closing arguments tainted the jury's verdict, the verdict could not be allowed to stand. In that context, the district court called the government's closing arguments "improper." *Id.*

The trial judge implicitly ruled that defendant had sufficiently preserved his objection to the gambling metaphor so that he was not required to take the unusual step of interrupting the government's closing argument. An appellate court is not entitled to second guess that conclusion, which was certainly not an abuse of discretion. The trial judge recognized that there was a point at which the relevance of the large losses produced

by risky trading was outweighed by the danger of distracting the jury from focused consideration of the actual charges. That grey zone was never well defined throughout the trial, and its demarcation points were not clarified before the closing arguments, despite the granting of a continuing objection. Perhaps both sides should have sought clarification before the closing arguments.

In my view, the real issue is not whether one side acted "improperly." It is the potential effect of this situation on the jury which matters. The experienced trial judge, who sat through the trial and the closing, concluded that the balance had tipped too far within that grey zone and that the interest of justice required a new trial.

Given that the trial judge lacked confidence that the verdict was based on proper considerations, and given the context in which the trial judge ruled, an appellate judge cannot say that the trial judge's conclusion was unreasonable. Indeed, the decision to grant a new trial does not even approach being an abuse of discretion.

CAMPBELL, Senior Circuit Judge, dissenting. This appeal centers around two issues: (1) whether in ruling upon defendant's motion for a new trial, the district court had to apply the plain error standard in Fed.R.Crim.P. 52(b)—a question turning on whether defendant failed to lodge a timely objection within Fed.R.Crim.P. 51(b)[12] sufficient to preserve the error for which the new trial was granted, namely, the government's use of gambling metaphors in its closing, which the court felt may have induced a verdict based on the jury's moral disapproval of gambling; and (2) whether the U.S. Attorney's gambling rhetoric went so far as to exceed fair comment and, in the event plain error review was required, to meet that standard.

In answer to (1), I believe the district court was required to apply the plain error standard in ruling on the new trial motion. As for issue (2), it would be premature for us to pass judgment on whether the gambling rhetoric could be found to amount to plain error, that question being one for the district court in the first instance. I would vacate and remand while

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12. Fed.R.Crim.P. 51(b) provides,

> A party may preserve a claim of error by informing the court—when the court ruling or order is made or sought—of the action the party wishes the court to take, or the party's objection to the court's action and the grounds for that objection. If a party does not have an opportunity to object to a ruling or order, the absence of an objection does not later prejudice that party. A ruling or order that admits or excludes evidence is governed by Federal Rule of Evidence 103.

retaining jurisdiction so as to be able to decide in the future—should plain error be found below—whether that finding exceeds the district court's considerable discretion in the matter.

1. Adequacy of Objection

Judicial review is limited to "the notably ungenerous plain error standard" whenever "a defendant defaults on [the] obligation [to protect his own interests] by failing to make a contemporaneous objection to questionable comments in the prosecution's closing argument." *United States v. Taylor,* 54 F.3d 967, 977 (1st Cir.1995). Nothing in the language of Fed.R.Crim.P. 51 and 52, or in binding precedent, suggests that some different rule applies where a district court, as here, (rather than a court of appeals) is asked, post-verdict, to grant a new trial based on an alleged inappropriate closing.

One of the principal purposes of the contemporaneous objection requirement is to alert the district judge so that she or he can take on-the-spot curative steps, by instructing the jury to disregard the prejudicial rhetoric or in some other way minimizing the harm, thus obviating the trouble and expense of a new trial. As this court stated in *Taylor,* 54 F.3d at 972,

> [C]alling a looming error to the trial court's attention affords an opportunity to correct the problem before irreparable harm occurs. Then, too, the raise-or-waive rule ... precludes a party from making a tactical

> decision to refrain from objecting, and subsequently, should the case turn sour, assigning error. . . .[13]

Here, there is simply no indication that the gambling metaphors used by the government in its closing, and the purported moral disapproval they might engender in jurors, were concerns ever contemporaneously called to the district court's attention, either during the closing when those references were actually being made or, right after, before the case went to the jury, when the district judge could still have taken steps to cure whatever prejudice the rhetorical metaphors may have caused in the minds of the jurors. The basis for the grant of a new trial was not the brokers' testimony, to admission of which earlier, unsuccessful, objections were lodged and on which earlier objections the majority now relies in its opinion, but the colorful gambling metaphors employed by the government in closing argument which were later said by the district court to have carried the risk of inflaming the jurors' moral disapproval.

Had defendant contemporaneously objected to this allegedly inflammatory rhetoric either during or after

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13. In a later civil case, this court has said,

> We have made it transparently clear that the raise-or-waive rule can neither be ignored nor brushed aside as a "pettifogging technicality or a trap for the indolent." *Nat'l Ass'n of Soc. Workers v. Harwood*, 69 F.3d 622, 627 (1st Cir.1995). Rather, it is a prudential rule "founded upon important considerations of fairness, judicial economy, and practical wisdom." *Id.*

Muniz v. Rovira, 373 F.3d 1, 4 (2004).

the closing, before the case went to the jury, the court could have instructed the jury to disregard it and explained to the jurors why the analogies were prejudicial and overblown, thus obviating the extreme and costly remedy of a new trial. Even had the defense attorney hesitated to interrupt the government's argument, there was ample time afterwards to have lodged an objection and for the court to have taken corrective steps. Indeed, following the court's closing jury instructions, when counsel were invited to submit their objections to the charge, defense counsel took that opportunity to protest certain parts of the government's closing but never mentioned these supposedly outrageous misstatements. Nor did the judge say anything to counsel or the jury about them during or after the closing, as one might have expected had the earlier evidentiary objections relied on by my colleagues actually functioned so as to call to the judge's mind that the defense was now objecting to the closing's gambling rhetoric[14]—or even that the rhetoric violated the court's

14. Judge Lipez states that the court's earlier response, "You're covered under Rule 103," to Carpenter's request for a running objection to admission of the Merrill Lynch brokers' testimony (described by defense counsel as portraying Carpenter as "an aggressive speculator[,] river boat gambler") was a clear recognition by the court of a continuing objection that served later as an adequate objection under Rule 51(b) to the government's repeated rhetorical use, in its closing, of the gambling analogies. But Rule 103 of the Federal Rules of Evidence is an evidentiary rule. *See* Rule 51(b) ("A ruling or order that admits or excludes evidence is governed by Federal Rule of Evidence 103"). Appropriately, the objections in question all related to the court's

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own earlier cautionary admonition against overemphasizing certain matters. The court's silence on the subject at the crucial moments strongly suggests that whatever the earlier objections accomplished, they did not accomplish what Rule 51(b) seeks—namely to alert the court contemporaneously, when corrective action by the court still remains possible, that the defense is then and there objecting to certain language being used in the government's oratory.

The purpose of Rule 51(b), in other words, is to put the court on *actual*, not just constructive, notice that a party protests a particular alleged defect—here, the closing gambling rhetoric—so that, inter alia, appropriate corrective action can be taken immediately if warranted. Rule 51(b) is not well served by resting the finding of an adequate objection upon an elaborate chain of appellate inferences going back to non-contemporaneous objections made earlier for a different purpose. Rule 51(b) requires, and ordinarily receives, a practical interpretation, consistent with its purpose to alert the court in a meaningful way so that it can act before too late.

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admission in evidence of the brokers' testimony, which emphasized the risky nature of option trading but did not invoke repetitive gambling metaphors nor raise the question of whether analogizing defendant's conduct to gambling would captivate the disapproval of jurors based on their moral disapproval of gambling. A new trial was not granted because the court decided it had erred in admitting the brokers' testimony but because of the inflammatory nature of the gambling figure used in the closing, with its peculiar tendency to invoke moral disapprobation.

Appendix A

It is overwhelmingly evident from the record that no one, prior to the verdict, got the message, including the judge, that the defense was protesting the government's rhetorical gambling analogies—analogies which the district court later said may have elicited the jurors' moral disapproval based upon their distaste for gambling. Without having been contemporaneously alerted by a Rule 51(b) objection, the district court was obliged, when it ruled on defendant's post-verdict motion for a new trial, to employ plain error review under Rule 52(b). The government made this point when arguing the motion,[15] but the district court did not address it at all. As my colleagues agree, it now seems the court, in granting a new trial, used the ordinary review standard (although Carpenter argues otherwise in his appellate brief).

My colleagues contend we should leave it to the district court, in these circumstances, whether a sufficient objection was lodged to preserve the closing gambling metaphor issue. Here, the judge, in passing on the defendants' new trial motion, made no express finding that an objection had been made, nor did he rule

15. Judge Lipez, in the majority opinion, speaks of "looking in vain" for any indication that the government ever argued that objection to the closing's gambling metaphors had not been preserved. In fact, the government noted (under the heading that its "closing and rebuttal fell within the bounds of proper argument") that most of Carpenter's points had not been preserved, and listed the few that had been, making clear its belief that the defense's objection to the use of gambling metaphors was one that had not been preserved and was subject to plain error review.

at all on the government's contention that an objection had not been preserved by the defense on the use of the gambling metaphors during the closing. But my colleagues would infer from the district court's complete silence that it must have found a sufficient defense objection, and they say they must defer to the district court on that and all related matters.

My difficulty with the above is that it treats the raise-or-waive rule as if it were only of concern to the district court—to protect it, for instance, against being "sandbagged" in the common situation where a defendant appeals to this court from an adverse ruling of the trial judge concerning some matter never called to the court's attention below. My colleagues' viewpoint would hold that where the district judge is satisfied—as presumably he was here—with whatever steps defendant took, *or did not take,* to preserve an objection, that should end the matter.

But I believe such deference is extreme. The raise-or-waive rule, it is true, exists to protect the trial judge, but it also serves other important goals. As already discussed, it serves the purpose of judicial economy, forcing all concerned, including the court itself, to face issues—such as the challenged rhetoric used by the government here—at a time when corrective action can still be taken short of a costly new trial. The opportunity for correction afforded by a timely objection, as well as the penalty of plain error review for failure to object, also promote essential fairness to the other party, here the government—and not only to the government alone,

but to those who must bear the burdens of a new trial, such as the victims of defendant's alleged misconduct and other witnesses. Had there been a meaningful, contemporaneous objection here, the government would likely not have to retry the case, saving both monetary costs and the added burdens on many others.

This is not to question the district court's discretion, were there merely a question of disputed evidence over the making of a sufficient contemporaneous objection, to resolve that dispute. But, here, the only arguably pertinent objections in the record—those made earlier under Fed.R.Evid. 103 to the admission of certain testimony—fell flagrantly short of meeting the requirements of Fed.R.Crim.P. 51(b) for valid objections to the closing's gambling rhetoric. And the record contains nothing except silence to suggest that the district court, when granting a new trial, ever determined that an adequate objection—or any objection—had been made. Rules 51 and 52 are binding procedural rules to which courts must adhere. The wide discretion very properly given to the trial judge does not include the discretion to ignore or simply bypass the raise-or-waive rule.[16]

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16. Of course, one might imagine special circumstances where a defense objection might not be needed to preserve an issue. For instance, the judge might, when the offending conduct occurs, give voice, sua sponte, on the record, to his own objection, which might in some circumstances relieve the defense of the need to object separately. But it seems unwarranted to presume such a special exception here, given the judge's complete silence

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I would add that even the plain error standard of Rule 52(b) still allows a court, in appropriate circumstances, when faced with a strong sense that an injustice has or may have occurred, to allow a new trial even though a timely objection was not lodged—and our review of such a decision would and should take into account the trial judge's firsthand "feel" for a case tried in his presence. Nevertheless, plain error review remains a considerably tougher, higher, standard than ordinary review. Given defendant's default, the government was entitled to the reassurance that the latter standard was being applied in this case, since the question of whether or not the gambling rhetoric used went too far, and its likely unfair impact on jurors, is a close one as to which the standard of review used could well have a decisive effect on whether or not to grant a new trial.

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at and after the closing, especially as, when the gambling rhetoric was later called to the judge's attention, he granted the extraordinary relief of a new trial. Surely, one would suppose, if the judge had at all considered the questionable character of the rhetoric at the time it was delivered, or then had believed the defense had objected to it at some earlier time, he would not have remained silent in the face of such knowledge, allowing events to proceed and the jury to remain uninstructed as to the improprieties that had occurred. To infer on this record and in the face of judicial silence, the preserving of a sufficient objection, seems to me tantamount to saying that Rule 51(b) and its companion, 52(b), need not be observed by the trial judge unless he or she cares to do so.

2. Whether Gambling Rhetoric Was Excessive

As said, I believe that this appeal should be remanded to the district court with instructions to reconsider its new trial ruling under the correct plain error standard. A ruling by us at this juncture would be premature, since the district court's judgment based on its first-hand knowledge and feel is an essential prelude to whatever action this court takes. We would necessarily grant considerable deference to whatever view the district court takes on whether what occurred at the trial met the high standard of plain error. This does not mean there are no limits to our deference, nor that appellate review will thereafter be forbidden. A district court would not have carte blanche discretion to order a new trial simply because, to take a purely hypothetical example, it deemed the U.S. Attorney's closing remarks to be too eloquent and defense counsel's closing much less so-even if the trial court believed the difference had been decisive to the case's outcome. There are, moreover, some arguments an attorney may make which will be so entirely relevant as to be privileged as a matter of law, just as there are others which the district court may determine dispositively as going too far.

Here, the government argues that its gambling analogy was so apt that it fell within the safety zone and that, in any event, the analogy was not so extreme as to amount to plain error. This is not an easy issue, and it is one as to which the district court's ruling, along with its reasons, one way or another, will not only be helpful but essential. I would, therefore, remand for a new ruling

on the new trial motion, one explicitly based on the plain error standard, which, in these circumstances, the district court was, in my view, legally obliged by the Federal Rules of Criminal Procedure to apply. It is most unlikely the district court believed it was applying that standard when it ruled previously, and, given especially the closeness of the grounds for granting a new trial, I believe the government is entitled to a ruling expressly based upon the correct legal standard. Given the high hurdle of plain error review, a remand is no mere waste of judicial time. To the contrary, it could be critical to the outcome, and it is also a necessary act of fairness to the government and those persons and interests the government serves, given the defendant's failure to have preserved a proper objection.

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS DATED DECEMBER 15, 2005

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CRIMINAL NO. 04-10029-GAO

UNITED STATES OF AMERICA

vs.

DANIEL E. CARPENTER

MEMORANDUM AND ORDER
December 15, 2005

O'TOOLE, District Judge.

Daniel E. Carpenter was tried on an indictment charging him with fourteen counts of wire fraud in violation of 18 U.S.C. § 1343 and five counts of mail fraud in violation of 18 U.S.C. § 1341. The jury returned a verdict finding Carpenter guilty under all counts.

Following the trial, Carpenter timely filed a renewed motion for a judgment of acquittal pursuant to Fed.R.Crim.P. 29(c) and an alternative motion for a new trial pursuant to Fed. R Crim. P. 33. This memorandum and order addresses both motions.

Appendix B

I. *The Motion for Judgment of Acquittal*

Carpenter's original motion for entry of a judgment of acquittal asserted three reasons why he was entitled to that relief: (1) the government had failed to disprove his good faith; (2) the proof at trial amounted to a variance from or a constructive amendment of the indictment; and (3) the evidence was insufficient as a matter of law to sustain the guilty verdicts. In his reply brief to the government's opposition, he refined the last ground by arguing specifically that the evidence was insufficient to prove that he had "caused" the mailings or wire transmissions alleged in the indictment. He also asserted in the reply that a judgment of acquittal is required because the evidence at trial did not support venue for the trial of the indictment in this District.

A. *Venue*

Carpenter has persistently maintained an objection to venue in this District. In his Rule 29 motion, he repeats his previous substantive objection and adds a procedural one: the question should have been put to the jury.

As to the procedural point, there is no controlling law in this Circuit. Carpenter points to decisions in other Circuits where various statements have been made about the necessity or propriety of submitting factual disputes about venue to the trial jury. It has been said, for example, that venue is a question of fact which ordinarily must be submitted to the jury. *See United States v. Miller*, 111 F.3d 747, 749 (10th Cir.1997).

That statement, however, incorporates two distinct propositions: (1) that the determination of venue depends on the resolution of disputed facts, and (2) that resolution must be done by a jury, not a judge. The first proposition, as stated, is undoubtedly overbroad, because not all venue determinations involve factual disputes; many require only a conclusion as to whether venue is proper, the facts being undisputed. *See, e.g., United States v. Palma-Ruedas*, 121 F.3d 841, 848 (3d Cir.1997); *United States v. Baxter*, 884 F.2d 734, 736 (3d Cir.1989); *see also United States v. Perez*, 280 F.3d 318, 322 (3d Cir.2002) ("In Baxter and Palma-Ruedas, we could rule as a matter of law because the necessary facts were established and only the legal question of how broadly we would define venue remained."). But more importantly for the present controversy, it is by no means clear that the second proposition must necessarily follow from the first, even where the underlying facts on which venue will be determined are vigorously disputed by the parties. In other words, characterization of an issue as involving the determination of facts does not automatically mean it is a matter to be decided by a jury. Some factual disputes, such as disputes about the predicate for the admission of evidence, for example, are typically (with some exceptions) resolved by the judge. *See* Fed.R.Evid. 104(a). *But see, id.* 104(b). *See also Blake v. Pellegrino*, 329 F.3d 43, 47-48 (1st Cir.2003) (judge resolves "foundational facts"). Moreover, as a practical matter, the judicial resolution of a factual dispute raised by a pretrial motion to dismiss or to suppress evidence often serves as the crucial turning point on the road to either conviction or acquittal.

If identifying a factual dispute about venue does not by itself compel the conclusion that the issue must be presented to a jury, what else might? Is the question required to go to a jury because proper venue is ultimately a constitutional right? *See* U.S. Const. art. III, § 2, cl. 3; *id.*, amend. VI. Not necessarily. Fact disputes arising with respect to other fundamental constitutional rights—such as whether there has been an unreasonable search or seizure or whether the assistance of counsel has been effectively provided—are routinely resolved by judges, not juries. The constitutional character of the right therefore does not determine whether the decision-maker should be a judge or a jury.

Some cases from other Circuits suggest that venue is effectively an "element" of the offense and then apply the rule that the jury must resolve all factual disputes concerning elements of the offense. *See United States v. Record*, 873 F.2d 1363, 1366 (10th Cir.1989) ("Venue in criminal cases is an element of the prosecution's case. . . ."); *United States v. Winship*, 724 F.2d 1116, 1124 (5th Cir.1984) ("Venue is an element of any offense."). In this Circuit, however, it has been plainly held that venue is *not* to be regarded as an element of the offense. *See United States v. Georgacarakos*, 988 F.2d 1289, 1293 (1st Cir.1993) (citing *United States v. Hall*, 691 F.2d 48, 50 (1st Cir.1982)). Even without this circuit precedent, the idea that venue is an element of an offense is not compelling. There is no question that the burden rests with the prosecution to establish that venue for the trial is proper, and in this regard it may be correct to call

proof of proper venue an element of the prosecution's *case. See, e.g., Miller*, 111 F.3d at 749-50 ("Venue in federal criminal cases is an element of the prosecution's case. . . .") (quoting *Record*, 873 F.2d at 1366). Strictly speaking, however, venue is not regarded, even in other circuits, as an element of the *crime.*

Cases that refer to venue as an "element" of the offense seem to recognize that it is actually more like an isotope; it is not exactly like the other real, or "substantive," elements. *See United States v. Perez*, 280 F.3d at 330 ("[T]he term 'element' lacks its usual force in the context of venue. . . . When courts describe venue as an element, they often distinguish it from 'substantive' or 'essential' elements.") (citing cases); *Wilkett v. United States*, 655 F.2d 1007, 1011 (10th Cir.1981) ("Venue is, of course, unlike the substantive facts which bear on guilt or innocence in the case. Venue is wholly neutral; it is a question of procedure, more than anything else, and it does not either prove or disprove the guilt of the accused."). Unlike the rights to trial by jury, assistance of counsel, or confrontation of accusers, for example, the right to a trial in the proper venue can be waived—or more precisely, forfeited[1]—by the mere omission to claim it. *See Miller*, 111 F.3d at 750; *Winship*, 724 F.2d at 1124. Similarly, although it is ordinarily error for a court to omit to instruct the jury as to a substantive element of

1. "A party waives a right when he intentionally relinquishes or abandons it. . . . This is to be distinguished from a situation in which a party fails to make a timely assertion of a right—what courts typically call a 'forfeiture.' " *United States v. Rodriguez*, 311 F.3d 435, 437 (1st Cir.2002).

the offense even in the absence of a request for an instruction, the failure to request an instruction on venue ordinarily means that the issue is simply bypassed. *See United States v. Haire*, 371 F.3d 833, 839 (D.C.Cir.2004). But perhaps the most striking difference between the venue "element" and the substantive "elements" is that venue may be proved by just a preponderance of the evidence, rather than by proof beyond a reasonable doubt. *See United States v. Salinas*, 373 F.3d 161, 163 (1st Cir.2004). If the standard of proof for the venue "element" may be different from the standard of proof for the substantive elements of the offense, why may not the identity of the fact finder for that "element" be different as well?

It is undeniable that many cases can be found that seem to require the submission of the question of venue to the jury, at least in some circumstances. What is generally lacking is an explanation of *why* submission of the question is *required*, as distinguished from simply being permitted. Instead, the statements indicating that venue must be submitted to the jury seem often the product of reflex or habit, rather than decision. Here is an illustration. In *United States v. Grammatikos*, 633 F.2d 1013 (2d Cir.1980), the Second Circuit stated flatly: "Where the defense[ ] of . . . improper venue [is] squarely interposed, [it] *must be* submitted to a properly instructed jury for adjudication." *Id.* at 1022 (emphasis added). The court cited its prior case of *United States v. Rodriguez*, 465 F.2d 5, 8-9 (2d Cir.1972) as authority for the stated proposition. *Rodriguez* stands as an example of a case where the issue was in fact submitted to the

jury, but it is not authority for the proposition that it *must be* so submitted. The trial court in *Rodriguez* had submitted the question of venue to the jury. The government argued two alternate theories in support of a finding that venue was proper. On appeal, the court concluded that one theory was proper but that the other—that the offense in question was a continuing offense within the meaning of 18 U.S.C. § 3237, making venue proper in more than one district—was unavailable as a matter of law. Because it could not be determined which venue theory had persuaded the jury, the verdict was set aside and the case remanded. Whether or why submission of venue issues to the jury was required was not addressed by the *Rodriguez* court. So far as it appears, it was simply assumed that the question should be decided by the jury. From the fact that it *had been done* in *Rodriguez*, it appears that the *Grammatikos* court jumped to the conclusion that it *had to be done* in general. This seems to be a theme that runs through the cases.

None of this is to say that it is either wrong or inadvisable to submit contested venue questions to the jury, but rather simply to respond to the defendant's argument that it is necessary to do so. Indeed, asking the jury to decide contested venue questions in any given case may be counseled by a prudent regard both for the competence and traditional stature of juries and for the constitutional significance of the right to be tried only in a proper venue. *See United States v. Johnson*, 323 U.S. 273, 275-76, 65 S.Ct. 249, 89 L.Ed. 236 (1944). To say that a particular approach might be prudent,

however, is not to say that it is mandated, and thus the question of whether a judge or a jury should resolve the venue issue remains open, at least in this Circuit.

A practical rule of decision, even if it is not compelled, is suggested by the Third Circuit in *Perez*, and it may be rephrased as follows: the venue question should be submitted to the jury when (1) the defendant has timely objected that venue in the forum chosen by the government is improper, (2) there is a genuine issue of material fact upon which the question of venue necessarily turns, meaning that the venue question cannot legitimately be resolved without first resolving the underlying factual dispute, and (3) the defendant has timely requested that the jury be instructed on the issue and given the task of deciding it. *See Perez*, 280 F.3d at 327. *See also Haire*, 371 F.3d at 840 (adopting the *Perez* test).

Here, the first and third parts of the test (which are closely related) have been met.[2] Resolution of the issue therefore hinges on the second criterion, whether there was, in the evidence, a genuine issue of material fact upon which the venue question turned. I adhere to my conclusion, expressed in summary terms at the conclusion of the evidence, that there was no genuinely disputable factual issue upon which the resolution of the venue issue depended.

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2. Although, as the government has pointed out, the defendant's compliance with the third part was a bit on the casual side, it was sufficient.

For an offense that is a "continuing" one, venue is proper "in any district in which such offense was begun, continued, or completed." 18 U.S.C. § 3237(a). By statutory definition, mail fraud is such a continuing offense and may be prosecuted "in any district from, through, or into which" the mailed matter has moved. *Id.* Although § 3237(a) does not specifically address the offense of wire fraud, it is clear that to the extent the wire communication is sent from one district to or through one or more others, it also should be considered a "continuing" offense, with venue proper in any district in which the offense was "begun, continued, or completed." "Begun" and "completed" are clear enough; the offense is continued if the wire transmission passes through facilities of interstate wire communication on its way from beginning to end. *See United States v. Pace*, 314 F.3d 344, 349 (9th Cir.2002); *United States v. Goldberg*, 830 F.2d 459, 465 (3d Cir.1987).

Each of the mailings that form the basis for the five mail fraud counts (counts 15 through 19) began in Massachusetts. The uncontested proof at trial conformed to the allegations of the indictment as to these counts. There is no question that venue was proper as to these counts.

Similarly, all but two of the wire transmissions alleged to have been the instances of wire fraud were initiated in Massachusetts. (See counts 1-2 and 5-14.) Again, the uncontested proof at trial conformed to the allegations of the indictment. Counts 3 and 4, however, alleged wire transmissions originating in New

Hampshire. For these, the "begun" part of the venue statute is inapposite. However, in the case of count 3, the uncontested evidence at trial was that the transmission—a fax—was "completed" in Massachusetts by its receipt at the offices of Benistar Property Exchange Trust Company in Newton. As to count 4, the evidence was that the wire from the bank in New Hampshire to a Merrill Lynch account at Mellon Bank in Pittsburg cleared through the Federal Reserve Bank in Boston. Although the defendant tried to challenge this evidence by suggestive cross-examination, in the end the evidence stood as uncontroverted.[3]

Thus, venue was proper in this district under § 3237(a) even under the former "key verb" standard. *See United States v. Rodriguez-Moreno*, 526 U.S. 275, 279-80, 119 S.Ct. 1239, 143 L.Ed.2d 388 (1999) (rejecting "key verb" test as exclusive method of evaluating venue). Under the present test, which requires attention to all of the "conduct elements comprising the crime," *see United States v. Salinas*, 373 F.3d 161, 164 (1st Cir.2004), the conclusion that venue is proper in this District is confirmed. The scheme to defraud that is the subject of the indictment was carried out through the Benistar Property Exchange Trust Company office in Newton, Massachusetts. For all the transactions alleged in the indictment, it was in Newton that the specific documents for each exchange transaction were prepared

3. To the extent there was a genuine issue of fact which, as the trial judge, I am authorized to decide, I am convinced by a preponderance of the evidence that the wire alleged in count 4 passed "through" this district.

for delivery to the exchangors. Communications from the exchangors or their representatives were directed to Martin Paley and other workers in the Newton office. Apart from the distinct mailings or wire transmissions that are the specific conduct alleged to violate the respective statutes, the broader conduct was the promotion and administration of the exchanges centered in the actions of Paley and others in the Newton office.

Carpenter maintains that he did not commit acts within Massachusetts for which he can be held criminally liable. That is a separate matter, which is addressed later in this memorandum. The venue point is this: *if* Carpenter is properly held liable as a participant in the conduct of the scheme, many of the acts done in execution of that scheme occurred within Massachusetts, and venue is proper. This is one of those cases where the jury's guilty verdict necessarily implies a conclusion that venue for the trial of the charges against Carpenter was proper in Massachusetts. *See, e.g., Miller*, 111 F.3d at 751 (failure to instruct on venue when requested does not constitute reversible error where it is beyond a reasonable doubt that the jury's guilty verdict on the charged offense necessarily incorporates a finding of proper venue). If the acts constituting the conduct of the scheme were properly attributed to him, he acted within Massachusetts for venue purposes.

Appendix B

B. *Variance/Constructive Amendment*

Carpenter argues that the government's proof at trial focused on misrepresentation by *omission*, whereas (he says) the indictment charged only affirmative misrepresentations. He contends that the variance of the proof from the indictment amounts to an illegitimate constructive amendment of the indictment. The government insists that the proof at trial was consistent with the allegations of the indictment.

The indictment alleged that Carpenter made written and oral statements that were materially false. *See, e.g.*, Superseding Indictment, ¶ 27. There was no evidence at trial that Carpenter personally made any oral misrepresentations, so the focus was on the written statements that the indictment alleged were materially false. The government's theory, and its argument to the jury, was that certain statements in written materials provided by Benistar to the exchangors were either plainly false or were "half-truths" that required that fuller information or explanation be given to the exchangors if they were not to be considered materially misleading.[4] Put another way, the fraudulent scheme alleged in the indictment included the "omission" to clarify the half-truths that the defendant directed toward the exchangors. This theory is well within the scope of the indictment, and proof of such "omissions" was neither a variance nor a new theory. There was no constructive amendment of the indictment.

4. Carpenter's argument that there can be no written, as opposed to oral, half-truths is unconvincing.

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C. *Sufficiency of the Evidence*

Carpenter argues that the evidence at trial was insufficient to prove him guilty of mail or wire fraud beyond a reasonable doubt. He focuses on two propositions: (1) the government's evidence failed to disprove his good faith; and (2) the government failed to prove that he had "caused" the mailings or wire transmissions that formed the basis for each of the counts in the indictment.

Carpenter's good faith argument misses the mark. The good faith he has in mind (as described in his motion for acquittal) was his belief that there were no restrictions on his ability to invest exchanger's funds in any manner he saw fit. However, this good faith belief on his part was not the relevant one.

The concept of good faith enters the prosecution of mail or wire fraud offenses in relation to the government's burden to prove that the defendant had a specific intent to defraud. *See United States v. Dockray*, 943 F.2d 152, 155 (1st Cir.1991); *New England Enterprises, Inc. v. United States*, 400 F.2d 58, 71 (1st Cir.1968). That is, good faith is essentially the opposite of an intent to defraud. *Dockray*, 943 F.2d at 156. Thus, when a defendant puts his good faith in issue, it becomes part of the government's burden to sustain its proposition that he acted with intent to defraud by negativing any inference that might be permissible on the evidence that the defendant had acted in good faith.

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In this case, the government's theory was that Carpenter knew that the promotional materials and transactional documents used by Benistar contained assurances to exchangors that their funds once turned over to Benistar would be held safely in escrow accounts from which they would not move except to be reinvested in qualifying property or to be returned to the exchangors, and further that Carpenter knew that these assurances were either false or materially incomplete. More particularly, as the government's theory goes, Carpenter knew that the exchangors were not being advised that, contrary to the assurances in the documents, he intended to use their funds to invest in the options market. In other words, the scheme was to obtain the exchangors' money on the basis of assurances known by Carpenter to be fraudulent. The government's theory was supported by evidence at trial that would have permitted the jury to conclude that Carpenter knew what the documents that were used to induce the exchangors to entrust their money to Benistar did and did not say and, more specifically, that he knew that the material information that their funds would be used in options trading was withheld from the exchangors. Upon this evidence, the jury could find beyond a reasonable doubt that Carpenter had a specific intent to defraud, implying a rejection, by the requisite standard of proof, of a claim of good faith.

Whether Carpenter believed in good faith that he was free, under the terms of the transactions with the exchangors, to invest their funds as he saw fit—including by engaging in options trading—is not the point. Such a

good faith belief would not be inconsistent with proof of specific intent to defraud, as discussed above. The object of the scheme to defraud was obtaining control of the exchangors' money by false pretenses; the fraud was not, as the defendant has himself repeatedly emphasized, the pursuit of an incautious investment strategy. The scheme's object was achieved when the money was obtained, before it was invested. Even if, as the defendant believes, there were no positive legal or contractual impediments to his investing the funds as he wished, that belief does not necessarily affect the existence of a prior intent to obtain control of the money by false pretenses.

Carpenter's other argument, that the evidence was insufficient to prove that he "caused" the alleged mailings and wire transmissions, is more substantial. The respective mailings and wire transmissions, it bears emphasizing, were the "gist" of each of the charged offenses. *See United States v. Wood*, 364 F.3d 704, 726 (6th Cir.2004); *United States v. Brooks*, 748 F.2d 1199, 1202 (7th Cir.1984). The jury was instructed as follows:

> To cause an interstate wire transmission is to do an act with the knowledge that a reasonably foreseeable consequence of that act is that an interstate wire communication will be transmitted by someone. Similarly, to cause the mails to be used is to do an act with the knowledge that it is reasonably foreseeable that the use of the mails will follow.

See First Circuit Pattern Criminal Jury Instructions §§ 4.12 and 4.13 (1998).

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According to the evidence, any act done by Carpenter was, relative to other actors, somewhat remote from the actual mailings or transmissions specified in the indictment. All of the wire transmissions and three of the five mailings were most directly "caused" by the exchangors or their agents, sending funds either to Benistar or directly to Merrill Lynch or PaineWebber. Two of the mailings (counts 15 and 19) were directly "caused" by someone at the Benistar Newton office, sending funds to Benistar's Connecticut office.

At the next remove was Paley, who solicited the exchangors and executed the transaction documents. It was certainly foreseeable to him that mail and/or wire transmissions would occur in consummating the transactions. He had to have been aware not just that sometime, somewhere, somebody would use the mails or interstate wire communications facilities; he had to have known who was likely to do so and when. He can plainly be said, under the applicable definition, to have "caused" the mailings or wire transmissions alleged in the indictment.

Carpenter stands farther back, both in time and in proximity, from the critical events that are the gist of the charged offenses. On the evidence, any acts by him that preceded any given mailing or wire transmission (and therefore could have caused the transmission) were confined to setting up of the Benistar Property Exchange Trust business with Paley. However, those acts were far from insignificant. The jury could have found on the

evidence that Carpenter reviewed and approved the promotional materials and transaction documents that contained materially false statements or misleading half-truths. Put another way, the evidence permitted the jury to conclude that Carpenter agreed with Paley to form a company to engage in the business of serving as a qualified intermediary for Section 1031 property exchanges, that Carpenter and Paley jointly produced the documents with allegedly fraudulent content and agreed to their use in soliciting exchangors to entrust their funds to that company, that Carpenter expected and intended Paley to use the documents in the transactions with the exchangors, and that Carpenter reasonably foresaw that the mails or interstate wire communications facilities would be used in the consummation of the transactions.[5]

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5. "Causation" in mail fraud cases has been defined very broadly by the courts. *See Pereira v. United States*, 347 U.S. 1, 8-9, 74 S.Ct. 358, 98 L.Ed. 435 (1954) ("Where one does an act with knowledge that the use of the mails will follow in the ordinary course of business, or that such use can reasonably be foreseen, . . . then he 'causes' the mails to be used."); *United States v. Pimental*, 380 F.3d 575 (1st Cir.2004) (finding that the defendant had "caused" a mailing where he had misrepresented the nature of his business when applying for worker's compensation coverage and insurance company employee later sent a summary of his meeting with the defendant to the insurance company's headquarters); *United States. v. Bortnovsky*, 879 F.2d 30 (2d Cir.1989) (defendant "caused" mailing where he filed false report with insurance company and that company, two years later, mailed the defendant a letter advising them of the need to promptly file suit in order to preserve rights under policy).

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Though Carpenter may not have acted as directly as Paley did to solicit exchangors or to execute the transaction documents with them, his participation in the creation of Benistar Property Exchange Trust Company was more than just an isolated historical event with no ongoing effect. To the contrary, having joined with Paley initially to devise the fraudulent scheme, Carpenter remained a participant in it. Paley's acts in furtherance of the scheme produced the funds which Carpenter used to conduct his trading.

Some courts have noted some similarity between a scheme to defraud in the context of the mail and wire fraud statutes and a criminal conspiracy. *See, e.g., United States v. Cohen*, 516 F.2d 1358, 1362 (8th Cir.1975); *United States v. Grow*, 394 F.2d 182, 203 (4th Cir.1968). It has been suggested that an "individual participant in a fraud scheme will be held liable for the acts of his agents and co-schemers that are within the general scope of the scheme . . . unless, as in a conspiracy, he undertakes some affirmative act of withdrawal." *Cohen*, 516 F.2d at 1364.

There are good reasons to be skeptical of an approach that would tend to treat mail or wire fraud substantive charges as implicitly charging a conspiracy. First of all, it is entirely unnecessary. If the facts presented to the grand jury warrant it, an indictment for mail or wire fraud can easily include a conspiracy count as well. Moreover, the notion of "implicit" charging has little, if anything, to recommend it, for reasons both of simple clarity and substantial due process. Reflexively

conflating a fraudulent "scheme" with a "conspiracy" is also likely to confuse the substantive law as to either: for example, proof of an agreement is not necessary for proof of a scheme, as it is for proof of a conspiracy.

Nonetheless, there is some value perhaps to the analogy, including the notion of affirmative withdrawal, in considering whether the evidence in this case was sufficient to permit a jury to conclude that Carpenter's "acts" in setting the scheme in motion may be considered still causally effective at later points in time when Paley acted in other ways to further the scheme. By continuing his relationship with Paley in the Benistar Property Exchange Trust Company, Carpenter was effectively ratifying and renewing the initial institution of the scheme they had jointly formed, namely the continued use of the misleading documents to solicit exchangors, whose funds Carpenter used to invest in the options market. A jury finding to that effect was warranted on the evidence, and such a finding would have further justified a conclusion that Carpenter committed the crimes alleged.[6]

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6. It should be emphasized that this analysis is directed toward Carpenter's culpability as a principal, for having himself used the mails and interstate wire communication facilities to execute a scheme to obtain money or property by false or fraudulent pretenses. He was not (although he might have been) charged as a co-conspirator with Paley, and although the indictment contains a reference to 18 U.S.C. § 2, during trial the government disavowed a theory of Carpenter's culpability based on his having aided or abetted Paley. His conviction rests on his own acts, not on Paley's attributed to him.

For all the foregoing reasons, Carpenter's motion for judgment of acquittal is DENIED.

II. *The Motion for a New Trial*

Carpenter asserts several reasons why a new trial should be ordered. Two of his arguments—that venue was improper and that the indictment was constructively amended—have been addressed in connection with his motion for a judgment of acquittal. Essentially for the same reasons, no new trial is warranted.

His other arguments for vacating the verdict and granting him a new trial fall under two general claims. First, he says the government violated its disclosure obligations in certain respects that prejudiced him. Second, he contends that the government's arguments to the jury were improper.

A. *Disclosure*

Carpenter contends that the government failed to disclose information it knew about Martin Paley that had potential exculpatory value. While the background to this argument is the case law emanating from *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) and *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), Carpenter's argument is more particularly based in this Court's Local Rules. Local Rule 116.2 (captioned "Disclosure of Exculpatory Evidence") establishes a timetable for the disclosure by the government of potentially exculpatory material. It begins with a definition of exculpatory information:

(A) Definition. Exculpatory information includes, but may not be limited to, all information that is material and favorable to the accused because it tends to:

> (1) Cast doubt on defendant's guilt as to any essential element in any count in the indictment or information;
>
> (2) Cast doubt on the admissibility of evidence that the government anticipates offering in its case-in-chief, that might be subject to a motion to suppress or exclude, which would, if allowed, be appealable pursuant to 18 U.S.C. § 3731;
>
> (3) Cast doubt on the credibility or accuracy of any evidence that the government anticipates offering in its case-in-chief; or
>
> (4) Diminish the degree of the defendant's culpability or the defendant's Offense Level under the United States Sentencing Guidelines.

L.R. 116.2(A).

Two preliminary observations about this definition are in order. First, the categories of information listed in the Local Rule as potentially exculpatory are

consistent with the applicable case law, covering matters that may be directly exculpatory in that they tend to negative an inference of the defendant's guilt, as well as matters that are indirectly exculpatory in that they impeach or call into question some of the government's inculpatory evidence. Second, it is worth noting the important qualification in the Rule's preamble, as in the case law: to be exculpatory, information must be both "material" and "favorable to the accused."

Assessing the materiality of potentially exculpatory information is guided by the principles outlined by the Supreme Court in *Kyles v. Whitley*, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995) and *United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). Materiality is not judged simply by asking whether the information might be favorable to the defendant in some degree. Put the other way around, not all information favorable to the defendant is necessarily material. *Kyles*, 514 U.S. at 437, 115 S.Ct. 1555; *Bagley*, 473 U.S. at 675 & n. 7, 105 S.Ct. 3375. The touchstone of materiality is whether "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Bagley*, 473 U.S. at 682, 105 S.Ct. 3375. "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles*, 514 U.S. at 434, 115 S.Ct. 1555.

The materiality of the undisclosed information is to be assessed not in isolation, but in the context of the entire record at the trial. *See United States v. Agurs*, 427 U.S. 97, 112, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976).

Carpenter's argument that the government withheld exculpatory information from him focuses on Local Rule 116.2(B)(2)(e) and (f),[7] which provide:

> (e) A written description of any prosecutable federal offense known by the government to have been committed by any witness whom the government anticipates calling in its case-in-chief.
>
> (f) A written description of any conduct that may be admissible under Fed.R.Evid. 608(b) known by the government to have been committed by a witness whom the government anticipates calling in its case-in-chief.

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7. Carpenter also makes two more general and perfunctory arguments, based on Local Rule 116.2(B)(2)(a) and (B)(2)(c), that the government was required to provide "information that tends to cast doubt on the credibility of [Paley]" and, similarly, that it was required to provide "[a]ny inconsistent statement . . . made orally or in writing by [Paley]." As explained in greater depth in the discussion of the government's obligations under Local Rule 116.2(B)(2)(e) and (f), *see* text pp. 18-23, the government did provide Carpenter with all material information it was required to produce under Rule 116.2. The government's failure to disclose its own subjective evaluations of that information does not constitute a violation of the Local Rules.

Relying on these provisions, he asserts the government improperly failed to disclose to him its belief that Paley had lied to government investigators when he told them in interview sessions that he had not known until December 2000 that Carpenter was investing exchangors' funds in the options market. Paley had been telling the government all along that he himself had no part in or knowledge of the risky investment strategy being pursued by Carpenter, the intended inference being that he had not intentionally misled the exchangors by withholding that information, because he himself had been duped by Carpenter. At trial, the government pointedly refrained from asking Paley whether he knew how the funds were being invested by Carpenter, because the government believed his answer might be false.[8]

The government had provided the defense with FBI 302 reports summarizing what Paley had told government agents, as well as copies of documents that Paley had furnished to the government from his own or Benistar's files. In other words, the government disclosed what Paley had said to them. What was not disclosed, but which Carpenter asserts should have been, was the government's belief that Paley was not being truthful in his statements to agents and to the prosecutors. Carpenter reasons that if the prosecutors believed Paley was lying to them and the agents, then

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8. Paley was extensively cross-examined by the defense about his knowledge of the options trading, and he gave inconsistent testimony. At different points, he both admitted and denied that he knew as early as September 1998 how the funds would be invested by Carpenter. *See* Appendix A.

they must also have realized that Paley was prosecutable under 18 U.S.C. § 1001 (punishing materially false statements), and this should have been disclosed under Local Rule 116.2(B)(2)(e). In addition, such instances of deceptive conduct might be admissible under Fed.R.Evid. 608(b) in the course of Carpenter's cross-examination of Paley, requiring disclosure under Local Rule 116.2(B)(2)(f). Moreover, Carpenter adds, if Paley's denials that he knew how Carpenter was investing the funds were false, then under the government's theory of this case, he also would have been culpable (and therefore prosecutable) in the scheme to defraud, and that should have been disclosed pursuant to Local Rules 116.2(B)(2)(e) and (f) as well.[9]

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9. Carpenter also argues that Paley's alleged culpability for these crimes makes it "simply implausible" that no agreement or understanding was reached with the government to protect him from prosecution, and that the government's assertions to the contrary "def[y] logic, experience and common sense." Def.'s Reply to Government's Opp'n to Mot. to Set Aside the Verdict and Grant a New Trial, at 17-18. In his Rule 33 motion, he implies that such an agreement must exist and argues that the government must therefore have run afoul of Local Rule 116.2(B)(2)(c), which requires production of a "statement whether any promise, reward or inducement has been given to any witness whom the government anticipates calling in its case in chief." The only support Carpenter offers for this contention (in addition to his generalized suspicions) is that Paley's counsel met with the government in July of 2001, after which Paley sent him a fax congratulating him on a job well done and asking how much of his time would be taken up, presumably by issues related to Paley's testimony.

At trial, however, Paley explicitly denied that there was any such agreement. Trial Transcript, Day 9, page 57, lines 3-10

(Cont'd)

Carpenter's argument is unpersuasive. The government had disclosed the factual information it had about what Paley told government agents. Paley's statements as recorded in the 302s and his own personal notes and records were available to be used, and in fact were used, in cross-examination by the defense to attack his credibility. The defense position at trial was that Paley's statements, whether in trial testimony or in interviews with government agents, were not to be believed. The information provided by the government in pretrial discovery was utilized to attack his credibility, precisely the purpose intended to be facilitated by the discovery rules.

Carpenter's position amounts to an argument that the government must not only disclose exculpatory *evidence* or *information* in its possession about one of its witnesses, but also provide an *opinion* about the reliability of that information. After the government says to the defendant, "Here are all the statements made to

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(Cont'd)

(Q: "Mr. Paley . . . do you have any agreement whatsoever with the U.S. Attorney's Office?" A: "No, I do not." Q: "No immunity agreement?" A: "No." Q: "No promise you wouldn't be prosecuted?" A: "No agreement."). In its opposition to the Rule 33 motion, the government reiterated this position. Government's Opp'n, at 5 ("The government gave no promises, rewards or inducements to Paley. No assurances were made, no promises given, and no agreements entered.").

I have seen no evidence that leads me to believe that the government violated Local Rule 116.2(B)(2)(c), or that a further hearing on this issue is warranted.

us by the witness," Carpenter's claim is that it is then required to add the gloss, "But we don't believe him."

The government's evaluation of its own evidence would not be admissible or otherwise useable by the defense at trial. While the parties may argue that a particular witness should be believed or disbelieved, the witness's credibility is ultimately a matter for the jury to decide. The parties' own judgments are not relevant or even proper.[10] The discovery rules are designed to give a defendant the tools with which to discredit a government witness by disclosing the objective facts about what the witness has said or done in the past. The rules do not require the government to disclose subjective evaluations of the witness's statements or deeds.

Apart from being outside the scope of what might be defined as exculpatory evidence, such evaluative opinions are also not "material" in the necessary sense. Not being admissible or useable at trial, they cannot lead to a reasonable probability that the outcome of the trial would have been altered by their disclosure, which is necessary to a finding of materiality.

The defendant here argues that he could have used the information in a different way. Assuming that the

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10. Plainly the government cannot vouch that a witness's testimony is credible. *See United States v. Torres-Galindo*, 206 F.3d 136, 142 (1st Cir.2000). The defendant proposes a kind of "vouching for incredibility"—that the government should be *required* to say when it does not believe one of its witnesses.

government's view of Paley's credibility could not be made known to the jury, Carpenter argues that if he had known that the government thought Paley was lying when he said he lacked guilty knowledge of Carpenter's investment strategy, he would have formed a different trial strategy. In substance, rather than contending that Paley was a liar who had duped the government just as he had duped everyone else, he would have argued that everyone, including the government, agreed that Paley was a liar. He would have added that the government, notwithstanding its view that Paley was guilty, chose not to prosecute him but rather picked on the person Paley was attempting to frame, a fact that should lead the jurors to reject the attempt by finding Carpenter not guilty.

Two answers can be made to this argument. First, to accept it would be to expand the government's discovery obligations well beyond the bounds that have been set, either by precedent or by the Local Rules. What Carpenter proposes is not irrational. An "open file" regime of discovery could be imposed on the government in a criminal case, and could include a requirement that the government disclose not only hard information but also its evaluations, assessments, and even trial strategies. It is sufficient to say that such is not the state of the law concerning criminal discovery, which attempts to accommodate the defendant's right to a fair trial within the context of the traditional adversary process. *See Bagley*, 473 U.S. at 675, 105 S.Ct. 3375. If there is to be an expansion of the government's obligations to include disclosure of subjective assessments of evidence, it will have to come from those who wield the precedential gavel.

Second, this argument also fails the materiality test. If Carpenter had known what the government thought about Paley's truthfulness, he would have made his argument that Paley was a liar in a different way. He still made a forceful argument that Paley was a liar, backed up by a cross-examination of Paley that exposed the witness's many inconsistencies and prevarications. He may even have succeeded in convincing the jury of that fact. It is conceivable on the evidence that the jury could have thought that Paley was a liar but still have concluded that Carpenter was guilty. That seems to have been the government's view up to a point, and there is nothing inherently contradictory about it. Under these circumstances, Carpenter has not shown that the undisclosed information about the government's view of Paley's credibility—and thus his potential "prosecutability"—was material in the necessary sense. There is not a reasonable probability that Carpenter was denied a fair trial because the government did not identify Paley as a potential defendant in a false statements prosecution.

Carpenter also renews an argument made and rejected at trial. As noted above, Paley consistently told the government that he did not know until December 2000 how Carpenter was investing exchangor funds. Apparently, the government did not believe that was true; the statement appeared to be contradicted, or at least seriously qualified, by some of the documents Paley had produced. Consequently, in Paley's direct examination, the prosecutor deliberately avoided asking Paley when he learned that Carpenter was investing the funds in the options market

because such a question might have elicited what the government regarded as false testimony. Paley was asked on cross-examination when he first knew about Carpenter's investment use of exchangors' funds, however, and his answers could easily have been understood as contradicting what the FBI 302s reported he had said to the government.[11]

Carpenter pointed out that the FBI 302s showed that Paley had *not* told the government that he knew prior to December 2000 how Carpenter was investing the exchangors' funds. Consequently, Carpenter argued, the government had to realize that Paley's testimony on cross-examination, that he *had* told investigators that he knew of Carpenter's investing prior to December 2000, amounted to perjury. That realization, Carpenter asserts, imposed on the government the obligation to correct the perjury by stating in open court that it disbelieved Paley in this respect. Carpenter's argument was based principally on *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959).[12]

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11. The confusing and contradictory nature of Paley's testimony on cross-examination is evident from the Trial Transcript, excerpts of which are attached hereto as Appendix A.

12. In *Napue*, the prosecution asked a witness whether he had been promised leniency in exchange for his testimony. The witness replied that he had not. The prosecutor knew that this answer was false but did not correct it. The Supreme Court held that the prosecutor had an obligation not to let the false answer stand without correction.

I reject the argument now for the same reasons I did so at trial. There are two important differences between *Napue* and this case. First, in *Napue*, the prosecutor's own question elicited the false testimony, making the prosecutor effectively the sponsor of the falsity unless he took steps to repudiate it. Here, the false testimony[13] by Paley that Carpenter points to was not elicited by the prosecutor, and the prosecutor therefore is not implicitly the sponsor of the specific answers said to be false. It is not an uncommon thing for criminal prosecutions to depend on testimony from persons who are less than fully honest truth-tellers. It is one thing to hold the prosecution to an obligation to correct testimony it knows to be false when elicited as part of its own examination of its own witness, as in *Napue*. It is quite another to require the government to follow any cross-examination of its witness with a disquisition for the benefit of the jury evaluating how truthful (in the government's opinion) the witness was in answering defense counsel's questions.

Second, and more significantly, in *Napue* the falsity of the witness's answer was known only to the prosecutor. No other method of correction was available than to require the prosecutor to do it. In this case, the defense was well aware of the inconsistencies between what the FBI 302s recorded that Paley had said in the interviews and what Paley's contrary testimony was. Defense counsel was prepared to expose the inconsistencies to

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13. For purposes of evaluating Carpenter's argument, I assume that the testimony was false.

the jury and did so with some emphasis. Counsel was permitted to review the agents' raw notes from which the 302s were prepared and was further permitted to call the agents as witnesses to contradict Paley's testimony. The jury was given the tools to judge how false the testimony was and to decide what effect that might have on its evaluation of the issues presented.

There was no ethical breach by the government, and there was no need for any further remedy in light of the ample opportunity given to demonstrate Paley's putative perjury through the evidence.

B. *Prejudicial Inflammatory Argument*

In the government's closing argument, both in the chief argument and in the rebuttal, the prosecutors seized upon a remark attributed to Carpenter by a witness to build an extended metaphor likening his investments of exchangor funds in the options market to "gambling." This included not only repeated uses of some form of the verb "gamble," but also other gambling references, such as betting, cashing in chips, and doubling down.[14] On more than one occasion, the prosecutors referred to Carpenter's "gambling with

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14. Carpenter's reply brief cites fourteen occasions in the government's closings where gambling references were pointedly made. *See* Def.'s Reply to Government's Opp'n to Mot. to Set Aside the Verdict and Grant a New Trial, at 49-50. According to the e-transcript concordance available to me, the word "gamble" was used eight times, "gambled" once, "gambler" twice, and "gambling" seven times.

other peoples' money" to make money for himself—at one point it was said that he was gambling the exchangors' money so that he could "make a million for himself." Trial Transcript, Day Twelve, at page 95, line 19.

Carpenter objects that these repeated references to gambling were intended to, and did, inflame the jury's passions against the defendant, and consequently he urges that the verdict from the thus—incited jury must be set aside.[15] I agree.

The gambling characterizations were not, as a matter of the narrative of the government's case, wholly inapt. Carpenter's persistence in an investment strategy that was high-risk to begin with and was proving through most of 2000 to be dramatically unsuccessful could very plausibly be characterized as gambling. But the aptness of the metaphor to the behavior is not the only consideration. *See United States v. Felton*, 417 F.3d 97, 103 (1st Cir.2005) ("Technical accuracy is perhaps not conclusive. One can imagine situations in which an epithet carries connotations well beyond the crime charged (*e.g.*, 'murderer' in a case of negligent homicide),

15. He also advances other grounds for his argument that prosecutorial misconduct requires a new trial, such as violation of the "golden rule" that the jurors should not be asked to put themselves in the position of the exchangors. In light of the disposition of the "gambling" issue, it is unnecessary to address these other grounds in detail. It is enough to say that I would not find those other grounds, either separately or in the aggregate, to require a new trial.

or cases in which the description is gratuitously inflammatory, serving no reasonable purpose in summarizing the government's position."). The real problem is that the references, in addition to being persistently pejorative, had the tendency to lead the jury away from the charges in the indictment by inviting them to blame Carpenter because he was a gambler, or because he lost the exchangors' money, rather than because he had committed mail or wire fraud.

According to the indictment, the scheme to defraud that Carpenter used the wires and mails to execute entailed making false representations or half-truths to induce the exchangors to entrust their property, that is, the proceeds of the sale of real estate, to Benistar Property Exchange Trust Company. The deception succeeded when an exchangor gave the funds to Benistar. The specific mailings and wire transmissions alleged in each of the counts in the indictment all involved the sending to Benistar (or directly to an investment firm) of either transaction documents or the funds themselves. In each case, the crime was completed when the mailing or wire transmission occurred, before Carpenter had invested, or "gambled," any of the money. The "gambling" of the money was not part of the offense.

Evidence of Carpenter's investment activity was admitted not because that activity was the focus of the criminal charges—it was not—but because evidence that by mid-2000 Carpenter was experiencing heavy losses in the options trading was relevant to the question of whether he acted with the specific intent to defraud

necessary to support a conviction. The government's theory was that his knowledge of the losses he was sustaining in the trading tended to prove that he knew that representations he thereafter made to the exchangors that their money would be kept safe, would not be moved from an escrow account, etc., were false. In other words, even assuming, *arguendo*, he did not believe such representations to be false or misleading during the time when he was making profits on the investment of the funds and so was able to return to the exchangors all the money they had entrusted to Benistar, the jury could conclude that the misleading tendency of the representations had to have been known to him—and by inference had to have been intended by him—after he became aware of the magnitude of the losses he was suffering.

This was a rather limited purpose. Nonetheless, considerable evidence about the trading losses was introduced by the government. The figures and charts demonstrating the extent and persistence of the trading losses were dramatic. Moreover, this evidence was introduced in the latter stages of the government's case, close in time to the closing arguments. As the arguments were made, this evidence likely remained vivid in the jurors' memories.

Condemning Carpenter for "gambling," as the prosecutors persisted in doing, was an appeal to instincts of moral disapprobation about recklessness, waste, and perhaps even theft. The prosecutors' inflammatory argument repeatedly emphasizing the "gambling"

metaphor, coming as it did after the dramatic evidence of losses, may have diverted the jury from its consideration of the crimes charged and may thus have induced a verdict based on the jury's disapproval of the "gambling," rather than because the jury was satisfied beyond a reasonable doubt that the elements of the offenses charged had been proven.

A key consideration in evaluating a motion for a new trial because of inflammatory argument is the overall strength of the government's case. *See United States v. Manning*, 23 F.3d 570, 574 (1st Cir.1994); *United States v. Mandelbaum*, 803 F.2d 42, 45 (1st Cir.1986). Here, though sufficient to withstand a motion for judgment of acquittal, the case was not so strong that it can confidently be said that the repeated "gambling" references had no illegitimate effect on the jury's assessment of the evidence. On what was perhaps the crucial issue, the jury would certainly have been warranted in concluding beyond a reasonable doubt that Carpenter acted with intent to defraud, but a contrary conclusion also would have been rationally possible on the evidence.

Because it cannot be said with confidence that the government's improper closing arguments did not taint the verdict, the verdict cannot be allowed to stand. Accordingly, the motion for a new trial is granted, and the verdict of conviction is set aside.

III. *Conclusion*

For the foregoing reasons, the defendant's motion for judgment of acquittal (dkt. no. 160) is DENIED. His motion to set aside the verdict and for a new trial (dkt. no. 158) is GRANTED.

It is SO ORDERED.

December 15, 2005
DATE

/s/ George A. O'Toole, Jr.
DISTRICT JUDGE

Appendix A

Here is some of Paley's testimony regarding his knowledge of Mr. Carpenter's investment strategy, as given on cross-examination by defense counsel:

> Q. So as of September of 1998, you understood, Mr. Paley, there could be losses in the funds holding the clients', the exchangors' funds, correct?
>
> A. That's true.

Trial Transcript, Day Eight, page 39, lines 20-23.

> Q. Did you tell [the prosecutor] when you sat down across the table from him trying to convince him not to seek an indictment of you, Mr. Paley, that you knew from day one, September 1998, your clients' funds could potentially be lost to investment?
>
> A. No.
>
> Q. You didn't tell him that, did you, sir?
>
> A. No.
>
> Q. You knew if you told [the prosecutor] that, you knew if you acknowledged that you knew your clients' funds could be lost due to

investments, that wasn't going to prevent you, Mr. Paley, from being blamed, right?

A. That's true.

Id., at page 40, lines 7-18.

Q. You've testified on direct examination three or four times that you told [the prosecutor] that you didn't know your clients' funds were at risk of loss. You've said that three or four times?

A. I did not know that they were at risk of being lost.

Id., at page 41, lines 6-10.

Q. Mr. Paley, did you sit down with [the prosecutor] trying to convince him not to seek an indictment against you, and you told him that you didn't know until the end of December 2000 that your clients' funds were at risk?

A. That's true.

Id., at page 42, lines 13-17.

Q. Well, how could you have told [the prosecutor] on three occasions that you never knew your clients' principal was at risk when you've testified here in court that as of day

one, September of '98, you did know that your clients' principal was at risk?

A. The reason is because that (sic) I had not held signatory on accounts or managed the money.

Q. I didn't ask what your responsibilities were. I asked you what your knowledge was.

A. There were monies that were invested. Clients' monies were invested, yes.

Q. Mr. Paley, my question is when you were asked questions about this specific document by [the prosecutor], did you tell him that you knew, as you've testified today, as of September 9th, 1998, that your clients' funds could be lost to investment? Did you tell [the prosecutor] that when he asked you that question?

A. I did.

Q. You told [the prosecutor] that you knew that your clients' funds could be lost to investment?

A. That's a possibility, yes.

Id., at page 44, lines 5-24.

Q. You told [the prosecutor] when you sat down with him you were unaware that Mr. Carpenter had been trading the corpus, the principal, in the stock market until the end of 2000, correct?

A. That's true.

Q. That's not true, though, is it, sir?

A. That's true.

Q. You did know prior to December 2000 that Mr. Carpenter was investing your clients' funds in the stock market, didn't you?

A. He was investing clients' money in investment vehicles, yes.

Q. The stock market, sir?

A. Yes.

Q. And you knew that he was investing the clients' principal in the stock market?

A. Yes.

Id., at page 59, lines 6-24.

Q. . . . But, you sat down with [the prosecutor] and told him that you didn't know that, sir, until the end of 2000.

A. No, sir.

Q. You didn't tell [the prosecutor] that?

A. No, sir.

Q. So when you sat down with [the prosecutor] in December of 2001, in February of 2002, in January of 2004, you told [the prosecutor] that you knew your clients' funds, the principal, was being invested in the stock market before December 2000?

A. Yes.

Id., at page 61, lines 1-10.

APPENDIX C — AWARD, NASD DISPUTE RESOLUTION DATED DECEMBER 15, 2005

Award
NASD Dispute Resolution

In the Matter of the Arbitration Between:

Benistar Employer Services Trust Corporation and Benistar Property Exchange Trust Company, Inc. (Claimants) v. UBS PaineWebber Inc. n/k/a UBS Financial Services Inc. (Respondent)

Case Number: 03-08742

Hearing Site: New York, New York

Nature of the Dispute: Customers v. Member

REPRESENTATION OF PARTIES

Claimant Benistar Employer Services Trust Corporation ("BESTCO"): Richard S. Order, Esq., Axinn, Veltrop & Harkrider, LLP, Hartford, CT and Jack Robinson, Esq., Benistar, Stamford, CT.

Claimant Benistar Property Exchange Trust Company ("BPETCO"): Anthony R. Zelle, Esq., Denner O'Malley, LLP, Boston, MA. Previously represented by Richard S. Order, Esq., Axinn, Veltrop & Harkrider, LLP, Hartford, CT and Jack Robinson, Esq., Benistar, Stamford, CT.

Appendix C

Respondent UBS Financial Services, Inc., hereinafter collectively referred to as "Respondent": R. Todd Cronan, Esq., Goodwin Procter, LLP, Boston, MA.

CASE INFORMATION

Statement of Claim filed on or about: December 10, 2003.
Claimant BESTCO signed the Uniform Submission Agreement: December 9, 2003.
Claimant BPETCO signed the Uniform Submission Agreement: December 9, 2003.

Respondent's Answer to the Statement of Claim filed on or about: February 3, 2004.
Respondent signed the Uniform Submission Agreement: February 24, 2004.

CASE SUMMARY

Claimants BESTCO and BPETCO asserted the following causes of action: indemnification; contribution; breach of contract; conversion; fraudulent misrepresentation; breach of fiduciary duty; negligence and violations of New York and Connecticut Unfair Trade Practices Statutes. The causes of action relate to stock options of various technology stocks.

Unless specifically admitted in its Answer, Respondent denied the allegations made in the Statement of Claim and asserted various affirmative defenses.

Appendix C

RELIEF REQUESTED

Claimants BESTCO and BPETCO requested compensatory damages in the amount of $29,456,064.00; punitive damages in the amount of $58,912,128.00; pre- and post-award interest; forum fees in the amount of $1,800.00; attorneys' fees in the amount of $250,000.00; witness and production fees in the amount of $7,500.00; and other case-related costs in the amount of $5,000.00.

Respondent requested the dismissal of all claims against it, and entry of judgment in its favor, together with all reasonable attorneys' fees and NASD filing and forum costs arising from its defense to the Statement of Claim.

OTHER ISSUES CONSIDERED AND DECIDED

The parties have agreed that the Award in this matter may be executed in counterpart copies or that a handwritten, signed Award may be entered.

AWARD

After considering the pleadings, the testimony and evidence presented at the hearing, and the post-hearing submissions, the Panel has decided in full and final resolution of the issues submitted for determination as follows:

1. Respondent is liable for and shall pay to Claimant BPETCO compensatory damages in the amount of $8,705,195.91.

2. Respondent is liable for and shall pay to Claimant BPETCO interest in the amount of $3,825,039.23.

3. Respondent is liable for and shall pay to Claimant BPETCO attorneys' fees in the amount of $125,000.00 pursuant to the Federal Arbitration Act.

4. Any and all relief not specifically addressed herein, including punitive damages, is denied.

FEES

Pursuant to the Code, the following fees are assessed:

Filing Fees
NASD Dispute Resolution will retain or collect the non-refundable filing fees for each claim:

Initial claim filing fee	= $ 600.00

Member Fees
Member fees are assessed to each member firm that is a party in these proceedings or to the member firm that employed the associated person at the time of the events giving rise to the dispute. Accordingly, UBS Financial Services, Inc. is a party.

Member surcharge	= $ 3,750.00
Pre-hearing process fee	= $ 750.00
Hearing process fee	= $ 5,500.00
Total Member Fees	= $10,000.00

Appendix C

Adjournment Fees
Adjournments granted during these proceedings for which fees were assessed:

November 15-19, 2004, adjournment by
Claimant BESTCO = $ 1,200.00

Forum Fees and Assessments
The Panel has assessed forum fees for each session conducted. A session is any meeting between the parties and the arbitrator(s), including a pre-hearing conference with the arbitrator(s), that lasts four (4) hours or less. Fees associated with these proceedings are:

One (1) Pre-hearing session with a single arbitrator
@ $450.00 = $ 450.00

Pre-hearing conference: July 14, 2004 1 session

Four (4) Pre-hearing sessions with Panel
@ $1,200.00 per session = $ 4,800.00

Pre-hearing conferences:	May 4, 2004	1 session
	July 1, 2004	1 session
	October 1, 2004	1 session
	August 30, 2005	1 session

Fifteen (15) Hearing sessions
@ $1,200.00 = $18,000.00

Appendix C

Hearing Dates:	September 19, 2005	2 sessions
	September 20, 2005	2 sessions
	September 21, 2005	2 sessions
	September 22, 2005	2 sessions
	September 23, 2005	1 session
	November 14, 2005	2 sessions
	November 15, 2005	2 sessions
	November 16, 2005	2 sessions
Total Forum Fees		= $ 23,250.00

1. The Panel has assessed $7,750.00 of the forum fees to Claimant BESTCO.

2. The Panel has assessed $15,500.00 of the forum fees to Respondent.

Fee Summary

1. Claimant BESTCO is solely liable for:

Adjournment Fee	= $	1,200.00
Forum Fees	= $	7,750.00
Total Fees	= $	8,950.00
Less payments	= $	2,400.00
Balance Due NASD Dispute Resolution	= $	6,550.00

2. Claimants BESTCO and BPETCO are jointly and severally liable for:

Initial Filing Fee	= $	600.00
Total Fees	= $	600.00
Less payments	= $	600.00
Balance Due NASD Dispute Resolution	= $	0.00

3. Respondent is solely liable for:

Member Fees	= $10,000.00
Forum Fees	= $15,500.00
Total Fees	= $25,500.00
Less payments	= $10,000.00
Balance Due NASD Dispute Resolution	= $15,500.00

All balances are payable to NASD Dispute Resolution and are due upon receipt pursuant to Rule 10330(g) of the Code.

ARBITRATION PANEL

Alexander Forti - Public Arbitrator, Presiding Chairperson
Paul T. Green - Public Arbitrator
Farrell C. Glasser - Non-Public Arbitrator

Concurring Arbitrators' Signatures

I, the undersigned arbitrator, do hereby affirm, pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein and who executed this instrument, which is my award.

s/ Paul T. Green
Paul T. Green — 12/15/05
Public Arbitrator — Signature Date

December 15, 2005
Date of Service (for NASD Dispute Resolution use only)

APPENDIX D — BENISTAR PROPERTY EXCHANGE FUNDS FLOW DIAGRAM

[FOLD-OUT PAGE ATTACHED]

Benistar Property Exchange
Funds Flow Diagram (Net)
01/ 2000 through 01/2001

Customer Deposits

Customer Payments

Benistar Property Exchange
Merrill Lynch
Account 849- 07B01
01/01/00 thru12/31/00

$4,570,000

Benistar Property Exchange
Merrill Lynch
Account 849-07B10
01/01/00 thru12/31/00

Capital Losses:
$4,000,284

$2,271,833

$870,690

Customer Deposits

Customer Payments

Benistar Property Exchange
PaineWebber
AccountEX 15434 MR
10/01/00 thru01/31/01

$200,000

$4,280,187

$2,000,000

Benistar Property Exchange
PaineWebber
Account EX 15433 MR
10/01/00 thru01/31/01

Change in Value:
$7,212,443
(Loss)

Benistar Employer Services

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GOVERNMENT EXHIBIT
212

(3)

No. 07-515

In the Supreme Court of the United States

DANIEL E. CARPENTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
ALICE S. FISHER
Assistant Attorney General
DAVID E. HOLLAR
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the denial of a criminal defendant's motion for acquittal is subject to immediate interlocutory appeal under the collateral order doctrine when the district court has granted the defendant's alternative motion for a new trial.

2. Whether the government's interlocutory appeal of a district court order granting a new trial entitles a defendant to cross-appeal the denial of his motion for acquittal.

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In the Supreme Court of the United States

No. 07-515

DANIEL E. CARPENTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-46a) is reported at 494 F.3d 13. The opinion of the district court (Pet. App. 47a-88a) is reported at 405 F. Supp. 2d 85.

JURISDICTION

The judgment of the court of appeals was entered on July 18, 2007. The petition for a writ of certiorari was filed on October 16, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a trial in the United States District Court for the District of Massachusetts, a jury found petitioner guilty of fourteen counts of mail fraud, in violation of 18 U.S.C. 1341, and five counts of wire fraud, in violation of

18 U.S.C. 1343. Post-trial, the district court denied petitioner's motion for acquittal but granted his motion for a new trial. Pet. App. 47a-88a. The government appealed the new trial order, and petitioner cross-appealed the denial of his acquittal motion. The court of appeals affirmed the district court's grant of a new trial and dismissed the cross-appeal for lack of jurisdiction. Pet. App. 1a-46a.

1. Section 1031 of the Internal Revenue Code, Title 26 U.S.C., allows a person to sell commercial property but defer the capital gains tax if he uses the proceeds to purchase replacement property within 180 days. I.R.C. 1031(a)(3). To be eligible for this tax deferral, the seller cannot take possession of the proceeds during the 180-day window. Accordingly, so-called Section 1031 intermediaries offer their services to hold the proceeds in escrow until the seller is ready to purchase replacement property. Pet. App. 2a.

Petitioner served as chairman of Benistar Property Exchange Trust Company (BPE), one such Section 1031 intermediary. BPE's written agreements with its clients provided that the proceeds from their initial property sales would go directly to BPE. BPE was to hold those funds in a Merrill Lynch Ready Asset Money Market Account paying 3% interest (if the client wanted access to the funds on 48 hours' notice) or a Merrill Lynch Investment Account paying 6% interest (if the client was willing to wait 30 days for the funds). Pet. App. 2a-3a. BPE was to release the funds—either to the client or to the seller of replacement property—only on the client's written direction. C.A. App. 241, 254.

The trial evidence showed that petitioner had little direct contact with clients but approved almost all written materials that clients received from BPE. Pet. App.

3a; Gov't C.A. Br. 4-7. Petitioner was primarily responsible for receiving, holding, and disbursing clients' funds. In this capacity, he began to use those funds (without the clients' knowledge) for high-risk, speculative trading in stock options. Apparently, his intent was to return the clients' funds and specified interest to them, while keeping for himself the trading profits, which he hoped would exceed $1 million. Pet. App. 3a-4a; C.A. App. 391.

Petitioner first opened accounts at Merrill Lynch, which warned him orally and in writing that his stock option trading was extremely risky. The Merrill Lynch brokers counseled petitioner further on the dangers of his investment strategy when, in 2000, the stock market began a downturn. Petitioner continued the same high-risk trading activity and, after he had lost $4 million, Merrill Lynch terminated his trading privileges. Pet. App. 3a.

Petitioner then opened an account with Paine Webber with a similar plan and similar results. Petitioner engaged in high-risk options trading, despite warnings from Paine Webber, and his trading privileges were terminated after he sustained heavy losses. Although petitioner initially repaid outgoing clients with incoming client funds, the trading losses became so great that BPE was forced to close. BPE's clients lost approximately $9 million of the funds BPE held for them. Pet. App. 4a.

2. The government's theory at trial was that petitioner knew that promotional materials for BPE that he had seen and approved represented to investors—or misled them into believing—that their funds would be held safely in escrow accounts. More specifically, evidence presented at trial showed that petitioner knew

that none of the documentation BPE provided clients disclosed that their funds would be invested in high risk options trading. In other words, petitioner schemed to obtain money to pursue his risky financial ventures by falsely concealing that material fact from clients who thought their money instead "would be held safely in escrow accounts." Pet. App. 60a. To support its theory, the government introduced evidence at trial of petitioner's high-risk trading activity to demonstrate the falsity of many of the representations in BPE's literature that investor funds would be "kept safe." *Id.* at 6a.

Petitioner contended, among other things, that because the written agreements referred to the client money in either the 3% or 6% escrow accounts as "invested" he had "total [] unfettered discretion" to "invest" those funds in options if he so desired. At a minimum, he alleged, he believed in good faith that he had the right to make risky investments, and thus lacked the intent to defraud. Pet. App. 5a; C.A. App. 91, 99, 101, 152, 154-156.

In its closing argument, the government focused on petitioner's options trading activity after he had received warnings from brokers and contrasted this with petitioner's knowledge of the purpose of a Section 1031 intermediary to safely and securely hold funds in escrow. In this context, the government, without objection, referred to petitioner as having "gambled" with the funds on multiple occasions. Pet. App. 7a; C.A. App. 122-150. The defense responded to this argument in its own closing, arguing that investing in options is not gambling. C.A. App. 151-191.

3. At the end of the 13-day trial, the jury found petitioner guilty on all counts. The next week, petitioner filed two separate motions, one for a judgment of acquit-

tal under Fed. R. Crim. P. 29, and a separate motion for a new trial under Fed. R. Crim. P. 33. Crim. No. 04-10029, Docket Entry Nos. 158, 160. The motion for acquittal argued that the government had introduced insufficient evidence (1) that petitioner had not acted in good faith, (2) that petitioner caused the specific mailings and wires alleged in the indictment, and (3) that venue was proper in the District of Massachusetts. Petitioner also alleged a fatal variance from or constructive amendment of the indictment. Pet. App. 48a. The Rule 33 motion contended that a new trial was warranted because the government failed to disclose exculpatory evidence and made improper closing arguments. *Id.* at 66a.

4. The district court denied petitioner's motion for acquittal. Pet. App. 48a-66a. The court first concluded that venue was proper. *Id.* at 48a-57a. Next, the court found no constructive amendment or variance because the government's trial theory was "well within the scope of the indictment." *Id.* at 58a. The district court rejected petitioner's good faith argument because petitioner's purported good faith belief "that he was free, under the terms of the transactions with the exchangors, to invest their funds as he saw fit * * * is not the point." *Id.* at 60a. The fraud, the court explained, stemmed not from what petitioner did with the money but from the fact that he "obtain[ed] the exchangors' money on the basis of assurances known by [petitioner] to be fraudulent." *Ibid.* The district court found sufficient evidence in the record for the jury to conclude that petitioner "knew that the material information that their funds would be used in options trading was withheld from the exchangors" and to "find beyond a reasonable doubt that [petitioner] had a specific intent to defraud." *Ibid.* Finally, the court concluded in light of petitioner's review

and approval of the materially misleading promotional materials and transaction documents, as well as his role heading the company, that sufficient evidence supported the jury's conclusion that petitioner "reasonably foresaw that the mails or interstate wire communication facilities would be used in the consummation of the transactions." *Id.* at 63a.

Turning to the new trial motion, the district court rejected petitioner's claim that the government had committed any ethical breach in its disclosure of potentially exculpatory material. Pet. App. 66a-78a. The court, however, did find that the government's repeated use of gambling references in closing argument "may have diverted the jury from its consideration of the crimes charged and may thus have induced a verdict based on the jury's disapproval of the 'gambling,' rather than because the jury was satisfied beyond a reasonable doubt that the elements of the offenses charged had been proven." *Id.* at 81a-82a. The court determined that "the jury would certainly have been warranted in concluding beyond a reasonable doubt that [petitioner] acted with intent to defraud, but a contrary conclusion also would have been rationally possible on the evidence." *Ibid.* Thus, the court could not say "with confidence that the government's improper closing arguments did not taint the verdict." *Ibid.* On that basis, the court set the conviction aside and granted petitioner's motion for a new trial. *Ibid.*

5. The government appealed the grant of the new trial, arguing that because petitioner had not objected to the closing argument, plain error provided the appropriate standard. A divided court of appeals affirmed. Declining to apply the plain-error standard and considering the "substantial deference" afforded the trial court in

granting a new trial, the majority found no abuse in the decision. Pet. App. 8a-23a.[1] Judge Campbell dissented from that determination. He would have remanded the case for further findings under a plain error standard. *Id.* at 36a-46a.

Petitioner attempted to cross-appeal the denial of his motion for acquittal, but the court of appeals dismissed for lack of jurisdiction. Pet. App. 23a-33a. The court rejected petitioner's claim that he could appeal under the collateral order doctrine because that doctrine applies only when a failure to permit immediate appeal will "infringe rights which appellant could not effectively vindicate in an appeal after final judgment in the case." *Id.* at 26a (quoting *United States* v. *Kouri-Perez*, 187 F.3d 1, 5 (1st Cir. 1999)). Applying this Court's decision in *Richardson* v. *United States*, 468 U.S. 317 (1984), the court of appeals concluded that petitioner had no right not to be retried for his offense, so there was no right for him to vindicate on appeal. Pet. App. 26a-28a.[2] The court also noted that petitioner's "sufficiency arguments are deeply entwined with the merits of the mail and wire fraud charges that constitute the underlying action" and

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[1] Judge Lynch filed a concurring opinion, emphasizing that she did not find that the government had argued "improperly," but only that the district court could determine in the interest of justice that the closing might have accidentally distracted the jury from considering the charges. Pet. App. 34a-35a.

[2] The court of appeals noted that petitioner had not moved the trial court to dismiss the indictment on double jeopardy grounds and that the court of appeals was therefore "not reviewing a double jeopardy ruling by the trial court, or a claim that such a double jeopardy ruling itself falls within the collateral order doctrine." Pet. App. 27a-28a n.9. Rather, the court explained, petitioner had urged double jeopardy considerations in support of his argument that the district court's denial of the motion to acquit was itself subject to immediate appeal. *Ibid.*

there was "little comparability between the review" of the new trial grant and the review that would be necessary to resolve petitioner's sufficiency claims. *Id.* at 32a.

ARGUMENT

Petitioner contends (Pet. 15-23) that he is entitled to interlocutory review of his claim that the evidence at his first trial was insufficient, even though the district court granted him a new trial and the court of appeals affirmed that decision. That contention is foreclosed by the reasoning of *Richardson* v. *United States*, 468 U.S. 317 (1984). The court of appeals' application of *Richardson* is correct and does not conflict with the decision of any other appellate court. Review of that question by this Court is therefore unwarranted. Nor is there any need for the Court to review the second issue presented in the petition, whether the court of appeals had pendent jurisdiction over the denial of petitioner's motion to acquit in light of the government's interlocutory appeal of the district court's grant of a new trial. The court of appeals' decision on that point does not conflict with any decision of this Court or any other court of appeals, and the fact-bound determination that the two appeals were not sufficiently entwined with one another was correct and does not, in any event, warrant this Court's review.

1. Congress has, from the outset, limited appellate courts to reviewing the "final judgments and decrees" of federal district courts, a rule presently embodied in 28 U.S.C. 1291. See *Midland Asphalt Co.* v. *United States*, 489 U.S. 794, 798 (1989) (citing Judiciary Act of 1789, 1 Stat. 73, 84). "In a criminal case the rule prohibits appellate review until conviction and imposition of sen-

tence." *Flanagan* v. *United States*, 465 U.S. 259, 263 (1984).

In *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949), the Court has construed the final judgment rule to permit review of certain interlocutory decisions that implicate "rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated," *id.* at 546. To qualify for immediate appeal, under *Cohen*'s collateral order doctrine, an order must "[1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." *Will* v. *Hallock*, 546 U.S. 345, 350 (2006) (quotation marks omitted). In recent cases, the Court has stressed the doctrine's "modest scope." *Ibid.*

a. Appeal from the denial of a motion to acquit, when the district court has ordered a new trial, fails the collateral order doctrine's second requirement. Rather than being "completely separate from the merits of the action," review of a motion to acquit is exclusively about the merits of the action—the sufficiency of the government's evidence to prove the elements of the crime. See Pet. App. 32a (petitioner's "sufficiency arguments are deeply entwined with the merits of the mail and wire fraud charges that constitute the underlying action").

Petitioner does not cite any decision by any court of appeals that holds that the denial of a motion to dismiss on sufficiency of the evidence grounds is subject to immediate appellate review under the collateral order doctrine. To the contrary, several courts of appeals have, like the court below, specifically held that defendants are *not* entitled to review of the sufficiency of the govern-

ment's evidence under the collateral order doctrine. See Pet. App. 27a; *United States* v. *Eberhart*, 388 F.3d 1043, 1051-1052 (7th Cir. 2004), rev'd on other grounds, 546 U.S. 12 (2005); *United States* v. *Ferguson*, 246 F.3d 129, 137-138 (2d Cir. 2001); *United States* v. *Wood*, 958 F.2d 963, 970 (10th Cir. 1992). Therefore, that issue does not warrant further review by this Court.

b. In the absence of support for a collateral order appeal of sufficiency claims, petitioner attempts to analogize the denial of a motion to acquit to the denial of a non-frivolous motion to dismiss proceedings based on the Double Jeopardy Clause, which is immediately appealable, see *Abney* v. *United States*, 431 U.S. 651 (1977), but that analogy is mistaken.[3] As the Court explained in *Abney*, "[t]he elements of [a double jeopardy] claim are completely independent of [the defendant's] guilt or innocence." *Id.* at 660. The defendant "makes no challenge whatsoever to the merits of the charge against him" in raising a double jeopardy claim, only that he has already been subjected to jeopardy for the same offense. *Id.* at 659. Here, in contrast, the issue presented by petitioner on appeal went directly to the merits—that "the government failed to present sufficient evidence * * * to permit a reasonable jury to convict him." Pet. App. 23a. Thus, petitioner's analogy to double jeopardy fails.

Petitioner's analogy to double jeopardy is further flawed because, where, as here, a defendant has been found guilty and then granted a new trial, there has been no termination of the initial jeopardy. Under the Double Jeopardy Clause, acquittal of a substantive criminal charge bars retrial because it finally disposes of the

[3] The Double Jeopardy Clause of the Fifth Amendment provides: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. Amend. V.

case and terminates the defendant's jeopardy. See, *e.g.*, *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 571 (1972). This is so whether it is the jury, *United States* v. *Ball*, 163 U.S. 662, 671 (1896), the trial judge at a bench trial, *Smalis* v. *Pennsylvania*, 476 U.S. 140, 144 (1986), the trial judge on motion for acquittal, *Burks* v. *United States*, 437 U.S. 1, 10-11 (1978), or a reviewing court, *id.* at 18, that finds the evidence to be insufficient to sustain a conviction. By contrast, when a defendant's conviction is set aside based on "an error in the proceedings leading to conviction," *United States* v. *Tateo*, 377 U.S. 463, 465 (1964), the defendant remains in "continuing jeopardy" because the "criminal proceedings against an accused have not run their full course," *Price* v. *Georgia*, 398 U.S. 323, 326 (1970). In such circumstances, the Double Jeopardy Clause does not preclude retrial. *Ibid.*

In *Richardson* v. *United States*, *supra*, the Court held that the Double Jeopardy Clause does not bar retrial after a mistrial, despite a defendant's request for a judgment of acquittal. In that case, after the district court declared a mistrial based on jury deadlock, the defendant moved to dismiss the charges on double jeopardy grounds, arguing that the evidence presented at his trial had been insufficient as a matter of law. 468 U.S. at 318-319. The district court denied the motion, and the defendant appealed. *Id.* at 319. The court of appeals dismissed the appeal for lack of jurisdiction, and this Court issued a writ of certiorari. *Id.* at 319-320.

After finding the defendant's double jeopardy claim sufficiently colorable to support appeal under *Abney*, see *Richardson*, 468 U.S. at 322, the Court rejected it on the merits. The Court found that only an "event, such as an acquittal, which terminates the original jeopardy" implicates the Double Jeopardy Clause. *Id.* at 325 (cit-

ing *Justices of Boston Mun. Court* v. *Lydon*, 466 U.S. 294 (1984)). While an "appellate court's finding of insufficient evidence" constituted such an event, a trial court's declaration of a mistrial did not. *Id.* at 325-326. Consequently, "[r]*egardless of the sufficiency of the evidence at petitioner's first trial*, he has no valid double jeopardy claim to prevent his retrial." *Id.* at 326 (emphasis added). The Court also concluded that future double jeopardy claims based on similar facts were no longer "colorable" and thus would not be appealable before final judgment. *Id.* at 326 n.6.[4]

The decision of the court below correctly applies the holding and analysis in *Richardson*. While the defendant in *Richardson* sought sufficiency review after the court declared a mistrial based on a hung jury and petitioner here pursues review after the grant of a motion for new trial, that distinction does not warrant a different result. Petitioner's contention that the jury's *finding of guilt*, which has been vacated by a district court order granting a new trial, constitutes a "greater state of finality" than a mistrial based on a hung jury, Pet. 14, and that the former "terminates the original jeopardy," Pet. 18 (quoting *Richardson*, 468 U.S. at 325), is untenable. The only difference between *Richardson* and this case is that here twelve jurors found the government's

[4] As noted above, see *supra* note 2, petitioner did not move the district court to preclude a retrial on double jeopardy grounds, nor did he raise an independent double jeopardy claim in the court of appeals. See Pet. App. 27a-28a n.9. Petitioner instead raised double jeopardy concerns only to support his argument that the denial of a motion to acquit should be treated as a collateral order subject to immediate appeal. Thus, *Richardson*'s holding that the district court's denial of the defendant's double jeopardy motion in that case was sufficiently colorable to support appellate jurisdiction (before the issue was resolved by this Court) has no application to this case.

evidence sufficient to prove petitioner's guilt beyond a reasonable doubt. While jeopardy can terminate without an express acquittal, such as when a guilty verdict is returned only on a lesser charge, thereby implicitly acquitting the defendant on the greater charge, see *Price*, 398 U.S. at 329, a finding of guilt that is then vacated does not constitute termination of jeopardy as to the count on which the guilty verdict was rendered, *ibid.* As in *Richardson*, there has been no termination of jeopardy in petitioner's case because there has been no acquittal at any stage of the proceedings. Cf. *Lydon*, 466 U.S. at 309 (noting that a "claim of evidentiary failure" does not terminate jeopardy, while a "legal judgment to that effect" does).

Although petitioner did not raise a double jeopardy claim per se, see note 4, *supra*, it is notable that the courts of appeals have, following *Richardson*, uniformly concluded that the Double Jeopardy Clause does not preclude a retrial following the grant of a new trial, regardless of the sufficiency of the government's evidence at the first trial. See, *e.g.*, Pet. App. 27a; *Patterson* v. *Haskins*, 470 F.3d 645, 660 (6th Cir. 2006) (retrial after court of appeals' failure to consider sufficiency of the evidence claim did not constitute double jeopardy, "even assuming that we would have determined that the evidence was indeed insufficient"); *United States* v. *McAleer*, 138 F.3d 852, 857 (10th Cir.) ("when a guilty verdict is set aside on the defendant's motion, original jeopardy has not been terminated and retrial does not violate the Double Jeopardy Clause 'regardless of the sufficiency of the evidence at the first trial'"), cert. denied, 525 U.S. 854 (1998); *United States* v. *Gutierrez-Zamarano*, 23 F.3d 235, 238 (9th Cir. 1994) ("Appellant's retrial will not violate the Double Jeopardy Clause regard-

less of the sufficiency of the evidence at the first trial."); *United States* v. *Ganos*, 961 F.2d 1284, 1285 (7th Cir. 1992) ("the double jeopardy clause does not prevent the holding of a second trial when no court has determined that the evidence at the first trial was insufficient"); *United States* v. *Miller*, 952 F.2d 866, 874 (5th Cir.) (rejecting claim that double jeopardy bars retrial if evidence at initial trial was insufficient), cert. denied, 505 U.S. 1220 (1992).

Indeed, at least three courts of appeals have held that double jeopardy claims on grounds similar to those that petitioner advanced under Rule 29 were not sufficiently colorable to sustain collateral order review under *Abney*. See *McAleer*, 138 F.3d at 857 (construing appeal of denial of Rule 29 motion as claim of double jeopardy, but finding that defendant had "not raised a colorable claim"); *Ganos*, 961 F.2d at 1285 (double jeopardy claim based on facts such as petitioner's was "frivolous"); *Miller*, 952 F.2d at 872 n.5 (claim colorable in light of circuit precedent predating *Richardson*, but no longer colorable in light of holding in *Miller*).

Thus, even if petitioner's analogy of his Rule 29 appeal to double jeopardy claims were otherwise apposite, there would still be no reason for this Court to review the court of appeals' decision.

c. Petitioner appears to contend (Pet. 20-23) that the court of appeal's decision is somehow in tension with the practice adopted by many courts of appeals that, when the court orders a new trial on appeal from a final judgment, it should or must also review a challenge to the sufficiency of the evidence at the first trial. Any such practice, however, has no relevance to the jurisdictional question presented here: whether the denial of the mo-

tion for acquittal is a collateral order subject to immediate appeal.

Significantly, petitioner concedes that the "rough consensus" of the courts that have adopted such a practice recognize that "review of sufficiency arguments after conviction and prior to retrial *is not technically compelled by the Double Jeopardy Clause*." Pet. 21 (emphasis added). See, *e.g.*, *Patterson*, 470 F.3d at 657 (6th Cir); *United States* v. *Adkinson*, 135 F.3d 1363, 1379 n.48 (11th Cir. 1998); *United States* v. *Bishop*, 959 F.2d 820, 829 n.11 (9th Cir. 1992), overruled in part on other grounds as stated in *Boyle* v. *Brown*, 404 F.3d 1159, 1171 n.1 (9th Cir. 2005); *Miller*, 952 F.2d at 874 (5th Cir.); *United States* v. *Douglas*, 874 F.2d 1145, 1150 (7th Cir.), cert. denied, 493 U.S. 841 (1989). While petitioner cites the Tenth Circuit as having held that "the prohibition against double jeopardy requires" the practice, see Pet. 21 (quoting *United States* v. *Wiles*, 106 F.3d 1516, 1518 (1997)), petitioner does not contend that his interlocutory appeal would have been heard in that circuit. To the contrary, the Tenth Circuit has expressly held, in a case subsequent to *Wiles*, that the denial of a Rule 29 motion is not subject to interlocutory appeal when the district court grants a retrial, even when the appeal is construed as advancing a double jeopardy claim. See *McAleer*, 138 F.3d at 857.

Thus, the practice reflected in the cases petitioner cites provides no grounds for the Court to review his contention that the collateral order doctrine justifies the review of the denial of a motion for acquittal when the district court has granted the defendant's motion for a new trial.

2. Petitioner additionally argues (Pet. 23-33) that the court of appeals erred in rejecting his claim that

defendants have a right "as a matter of fairness and prudence" to cross-appeal whenever the government files an interlocutory appeal under 18 U.S.C. 3731 (Supp. IV 2004). That argument also lacks merit and does not warrant this Court's review.

Explicit statutory authorization is required for the government to appeal in a criminal case. See *United States* v. *Scott*, 437 U.S. 82, 84-85 (1978); *United States* v. *Sanges*, 144 U.S. 310 (1892). Section 3731 provides a limited set of circumstances in which the government may appeal, including when the district court "grant[s] a new trial after verdict or judgment." The statute authorizes only appeals "by the United States." 18 U.S.C. 3731 (Supp. IV 2004). As numerous courts of appeals have recognized, the statutory text implies no intent to permit a defense appeal or cross-appeal. See, *e.g.*, *United States* v. *Marasco*, 487 F.3d 543, 546 (8th Cir. 2007) ("the statute does not provide for a cross-appeal by a defendant"); *United States* v. *Hsia*, 176 F.3d 517, 526-527 (D.C. Cir. 1999), cert. denied, 528 U.S. 1136 (2000) (refusing to grant defendants "a windfall opportunity to delay proceedings via cross-appeal"), cert. denied, 528 U.S. 1136 (2000); *United States* v. *Hamilton*, 46 F.3d 271, 279 n.8 (3d Cir. 1995) (Section 3731 "preclud[es] a defendant from filing a cross-appeal") *United States* v. *Becker*, 929 F.2d 442, 447 (9th Cir.) ("A defendant may not file a cross appeal to a section 3731 interlocutory appeal."), cert. denied, 502 U.S. 862 (1991); *United States* v. *Margiotta*, 646 F.2d 729, 734 (2d Cir. 1981), cert. denied, 461 U.S. 913 (1983) (cross-appeal "unavailable with interlocutory appeals pursuant to §3731").

In particular, the Second, Third, Seventh, and Tenth Circuits have each held, as did the court below, that a government appeal of an order granting a new trial does

not entitle a defendant to cross-appeal the denial of his motion for acquittal. See *Eberhart*, 388 F.3d at 1051-1052 (7th Cir.); *Ferguson*, 246 F.3d at 137-138 (2d Cir.); *Wood*, 958 F.2d at 967-971 (10th Cir.); *United States* v. *Cahalane*, 560 F.2d 601, 608 (3d Cir. 1977), cert. denied, 434 U.S. 1045 (1978).

Petitioner urges the Court to grant the petition for a writ of certiorari in order to resolve a conflict between those courts and a decision of the Fourth Circuit in *United States* v. *Greene*, 834 F.2d 86 (1987), in which the court did review a defendant's sufficiency claim after affirming a government appeal from the grant of a new trial. The decision below does not squarely conflict with *Greene*, however, and, to the extent there might arguably be a conflict, there are good reasons to believe the Fourth Circuit would revisit the holding in *Greene* if presented with the opportunity.

First, it appears that in *Greene* the "question as to the appealability of the denial of the Rule 29(c) motion, * * * was abandoned" by the government, 834 F.2d at 87, after "the district court certified that in view of the government's appeal, there was no just reason for delay in determining the issue raised by the defendant in his Rule 29(c) motion as to the sufficiency of the evidence to convict him," *id.* at 89. Because the court of appeals appears to have viewed the district court's certification and government's waiver of its challenge to the appeal as significant, there is no clear conflict between that decision and the judgment below, where neither of those factors existed.

Second, in *Greene*, the defendant had moved the district court for acquittal because "to require another trial would violate his right not to be placed in jeopardy twice for the same offense." 834 F.2d at 87. The Fourth Cir-

cuit upheld its jurisdiction under the collateral order doctrine of "the district judge's denial of [Greene's] motion to dismiss the indictment on double jeopardy grounds." *Id.* at 89. To the extent that the court of appeals believed Greene's double jeopardy motion to be non-frivolous, immediate appeal would have been consistent with *Richardson*, 468 U.S. at 322, and *Abney*, 431 U.S. at 662. Here, by contrast, the court of appeals emphasized that petitioner had *not* moved the district court for relief on double jeopardy grounds, and, thus, there was no double jeopardy claim directly before it. Pet. App. 27a-28a n.9.

Third, while the Fourth Circuit has not had the need, or even the opportunity, to revisit *Greene* in the 20 years since that opinion issued, there are good reasons to believe that, to the extent the decision stands for the rule advocated by petitioner, the Fourth Circuit would reconsider the decision should the occasion arise. *Greene* did not even cite *Richardson* and its brief analysis combined reliance on the government's appeal with reliance on *Cohen*'s collateral order doctrine. Since *Greene*, at least seven courts of appeals have held that a cross-appeal from a Section 3731 appeal is not permitted, four in the explicit context of sufficiency of the evidence review. This Court too has reiterated the narrowness of pendent appellate review, restricting review of non-appealable orders to those "inextricably intertwined" with appealable ones or when review of the non-appealable order is "necessary to ensure meaningful review." *Swint* v. *Chambers County Comm'n*, 514 U.S. 35, 49-51 (1995). The Fourth Circuit has construed *Swint* to prohibit appellate review of non-appealable orders even when both the government and criminal defendant request such review as part of a conditional plea agreement, see *Uni-*

ted States v. *Bundy*, 392 F.3d 641, 649 (2004), thus casting significant doubt on the continuing vitality of *Greene*, to the extent that it ever stood for a general rule that the court of appeals could exercise pendent appellate jurisdiction over the denial of Rule 29 orders.

Petitioner contends (Pet. 26-28) that pendent appellate jurisdiction exists in this case under *Swint* because his motion for acquittal is "inextricably intertwined" with the review of his motion for new trial. The court of appeals correctly rejected that argument. The court correctly noted that to review petitioner's claims it would have to evaluate such issues as "causation, intent, constructive amendment of the indictment, reliance upon a theory of liability based on omission, good faith as an absolute defense, and venue." Pet. App. 32a. Not one of those issues was reviewed in the court's determination that the district court had not abused its discretion in concluding that the government's closing argument might have inadvertently caused the jury to convict based on its disapproval of petitioner's recklessly cavalier investment strategy rather than based on the evidence that petitioner acted with a specific intent to defraud. Even if there were some debate on the question, the court of appeals' finding that the two motions were not inextricably intertwined is a factual one that does not warrant this Court's review.

Finally, petitioner also raises various policy concerns that he contends justify interlocutory review of his sufficiency claim to serve "fairness and prudence." Pet. 24, 28-33. Principally, he contends that there are no "efficiency" gains from declining to review his motion for acquittal at this time. But this Court has made clear that such generalized arguments do not suffice to support collateral order review. It is only "avoidance of a

trial that would imperil a substantial public interest, that counts when asking whether an order is 'effectively' unreviewable if review is to be left until later." *Will*, 546 U.S. at 353.

In any event, the claimed efficiency of pendent collateral review in this case is not borne out. The primary issue on appeal from the new trial motion was whether the district court should have applied a plain error standard in evaluating the motion. See Pet. App. 8a-18a.[5] Little space was devoted in the briefs on the government's appeal to the overall weight or strength of the evidence against petitioner. In its brief, the government spent 18 pages explaining that it made no improper arguments and arguing that the district court used the wrong standard, Gov't C.A. Br. 28-43, but only three pages analyzing the strength of the evidence. *Id.* at 43-46. Petitioner devoted just four pages of his 61-page response brief to the purported "weakness of the government's case." Appellee Br. 32-36. Petitioner filed a separate, 58-page brief to press his Rule 29 claims. Cross-Appellant Br. 1-58. The court of appeals' fact-bound conclusion that it was unnecessary and inefficient to resolve those issues was correct and does not warrant review.

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[5] Indeed, that was the position adopted by the dissent. See Pet. App. 37a-44a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 07-515

IN THE
Supreme Court of the United States

DANIEL E. CARPENTER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF OF PETITIONER

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ARGUMENT

1. The petition's principal argument is that retrial will violate double jeopardy because Carpenter has already been subjected to one complete trial, through verdict, at which the evidence was constitutionally insufficient. The government acknowledges that interlocutory appellate review is necessary and appropriate to vindicate any even "colorable" double jeopardy argument. It claims that Carpenter's double jeopardy claim is no longer colorable because it is foreclosed by "the reasoning" of *Richardson v. United States*, 468 U.S. 317 (1984). Opp. 8. That is plainly incorrect.

The defendant in *Richardson* sought sufficiency review after a mistrial due to a hung jury, while Carpenter seeks review following a complete trial ending in a jury verdict. The government argues "that distinction does not warrant a different result," Opp. 12, but its superficial and formalistic analysis never acknowledges the many reasons that mistrials after a hung jury *are* different in important ways than trials that have proceeded all the way through jury verdict. When measured against the actual reasoning of *Richardson*, and the policies that this Court has repeatedly held underlie the Double Jeopardy Clause, this situation is far closer to *Burks v. United States*, 437 U.S. 1 (1978), than to *Richardson*—with the exception, of course, that Carpenter did not rob a bank and (because he had the misfortune of being subjected to a trial with

procedural flaws as well as deficient evidence) did not receive appellate review of his sufficiency claim.

First, this Court anchored *Richardson* in the mistrial rule's "own sources and logic ... established for 160 years." 468 U.S. at 323. It concluded that "Justice Holmes' aphorism that 'a page of history is worth a volume of logic' sensibly applies here," *id.* at 325–26, and that retrial has always been permitted after mistrial because "unforeseeable circumstances that arise during a trial making its completion impossible, such as the failure of a jury to agree on a verdict" do not implicate the "type of oppressive practices at which the double-jeopardy prohibition is aimed," *id.* at 324–25. That history is irrelevant here.

The only historical precedent supporting the government's position in *this* case was explicitly rejected in *Burks*. The traditional rule was that a defendant could be retried after a jury verdict of guilty, *because the defendant was thought to waive his double jeopardy rights by requesting a new trial.* But *Burks* expressly held that "[t]o the extent that our prior decisions suggest that by moving for a new trial, a defendant waives his right to a judgment of acquittal on the basis of evidentiary insufficiency, those cases are overruled." 437 U.S. at 18. This case just calls on this Court to enforce the necessary and obvious implications of that holding for double jeopardy analysis. It also presents a circumstance this Court could never have anticipated in *Richardson*—because the government had no right

to appeal the grant of a new trial until 18 U.S.C. §3731 was amended later that same year.

Second, the principal interest tilting the double jeopardy calculus in the government's favor in *Richardson* strongly supports the defendant here. This Court has long recognized "'society's interest in giving the prosecution one complete opportunity to convict those who have violated its laws,'" *Richardson*, 468 U.S. at 324 (quoting *Arizona v. Washington*, 434 U.S. 497, 509 (1978)). Thus, the government is entitled to "one full and fair opportunity to present [its] evidence," *Washington*, 434 U.S. at 505, "to offer whatever proof it could assemble," *Burks*, 437 U.S. at 16, and "to resolution of the case by verdict from the jury," *Richardson*, 468 U.S. at 326. A hung jury—unlike the case "in which the trial has ended in an acquittal or conviction"—deprives the government of that "one full and fair opportunity" because no jury has decided the "merits of the charges against the accused," *Washington*, 434 U.S. at 505, and "the defendant has neither been condemned nor exculpated by a panel of his peers," *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 575 (1977).

Here, the government presented all of its evidence *and* received a verdict on the merits of the charges from the jury. Unlike a hung jury but exactly like an acquittal, the guilty verdict "actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." *Id.* at 571. If the government failed to present a constitutionally sufficient case for guilt, it has no

legitimate interest left to vindicate. And the fundamental policy "lying at the core of the Clause's protections," of "prevent[ing] the State from honing its trial strategies and perfecting its evidence through successive attempts at conviction," *Tibbs v. Florida*, 457 U.S. 31, 41 (1982), weighs heavily in the defendant's favor. At a minimum, this must be true where, as here, the new trial ruling was based on prosecutorial misconduct *after* the close of evidence. *See Amicus* Br. of NACDL 2–3, 17–19. The government has offered all of its proof, and is in no position to "argue that additional evidence would have been presented, or that different trial strategy would have been pursued, had reversible error not been committed." *United States v. Marolda*, 648 F.2d 623, 624 (9th Cir. 1981).

The opposition's gloss on the underlying facts is both irrelevant and misleading. Of course the important legal issues presented here do not require this Court to delve into the facts. But the government simply refuses to acknowledge the glaring weaknesses in its case that led the prosecutors to believe they had to cross the line in closing arguments to secure a conviction. Even a cursory review of the record reveals that the government failed to introduce, much less prove, any *actus reus*, any *mens rea*, or any concurrence of the two as required by *Morissette v. United States*, 342 U.S. 246 (1952). Although the prosecution initially charged Carpenter with making written and oral misrepresentations to investors, it abandoned those allegations after it became clear that BPE President Martin Paley drafted all the materials and handled all the communications. Two FBI agents testified at

trial that Paley lied to them about his and Carpenter's respective roles. The jury was ultimately charged on a theory of alleged half-truths and *omissions*—although the integrated contract gave BPE sole investment discretion, and Carpenter plainly had no affirmative duty to disclose how the Exchangors' funds would be invested. (The law prohibits a qualified intermediary from undertaking any fiduciary or quasi-fiduciary responsibilities to investors). At most this case involved a breach of contract, which certainly does not rise to a "scheme to defraud." *McEvoy Travel Bureau, Inc. v. Heritage Travel, Inc.*, 904 F.2d 786, 790 (1st Cir. 1990). As a company BPE successfully completed over $100,000,000 in exchange transactions for 119 of 126 Exchangors. And PaineWebber has subsequently been held *fully* responsible for having caused all of the Exchangors' losses. *See generally* Pet. 5–7 and accompanying footnotes. There was no crime here.

2. The government argues that review is unwarranted because the courts of appeals have generally extended *Richardson*'s reasoning to this situation. Opp. 13. But it ignores the pervasive confusion and disarray in the case law, as well as the broad consensus in the courts of appeals that the government's proposed rule is plainly inefficient and unfair—even if they have reluctantly concluded that it is the best reading of *Richardson*'s ambiguous language.

First, the government does not dispute that, in the years following *Richardson*, many courts of appeals held that the Double Jeopardy Clause *did*

require them to address alternative sufficiency arguments even if they were reversing for a new trial. Pet. 20–21. More recently, the dominant trend has been to hold that sufficiency review is not technically compelled, but there remains, at a minimum, serious disarray in the decisions. *Id.* For example, the government cites *United States v. McAleer*, 138 F.3d 852 (10th Cir.), *cert. denied*, 525 U.S. 854 (1998), while disregarding the contrary analysis in *United States v. Wiles*, 106 F.3d 1516 (10th Cir. 1997), and *United States v. Haddock*, 961 F.2d 933 (10th Cir.), *cert. denied*, 506 U.S. 828 (1992), from the same court. *See also, e.g., United States v. Simpson*, 910 F.2d 154, 159 (4th Cir. 1990) ("[E]ven though we reverse appellant's convictions on Rule 403 grounds, it is still necessary to reach his claim of insufficient evidence ...[I]f he were to prevail on this claim, the double jeopardy clause would bar his retrial....").

Second, several courts of appeals have explicitly noted their dissatisfaction with this extension of *Richardson*. The Seventh Circuit has recognized "the logical and legal merit" of refusing to apply *Richardson* to this context, *United States v. Douglas*, 874 F.2d 1145, 1150 (7th Cir.), *cert. denied*, 493 U.S. 841 (1989); *see also United States v. Ganos*, 961 F.2d 1284, 1286 (7th Cir. 1992) (Ripple, J., concurring) (explaining that an extension of *Richardson* "does not follow inexorably"), the Ninth Circuit has lamented its "unfortunate effect," *United States v. Bishop*, 959 F.2d 820, 829 n.11 (9th Cir. 1992), and the Sixth Circuit has decried its "unsatisfying result" *Patterson v. Haskins*, 470 F.3d 645, 657 (6th Cir. 2006), *cert. denied*, 128 S. Ct. 90 (2007).

The government also does not deny that all of the courts of appeals, and some state courts, have explicitly adopted a prudential practice of reviewing alternative sufficiency arguments when presented as a matter of efficiency and fundamental fairness. Pet. 21–22. Although the lower courts have generally read *Richardson* to support the rule the government urges here, those courts have found that result so inappropriate and inconsistent with the basic values of the criminal law (including the values protected by the Double Jeopardy Clause) that they have rejected as a practical matter what they have felt constrained to embrace as a formal matter. Although the lower courts may be bound to read tea leaves in this Court's opinions even when they appear to produce "unfortunate" or "unsatisfying" results, the function of this Court is to correct such misimpressions.

Third, following either a panel's erroneous refusal to consider the sufficiency question on the first appeal, or following the grant of a *third* trial, the Seventh and Ninth Circuits have held that a defendant can challenge the sufficiency of the evidence *at his first trial* after a conviction at his second trial. *See Douglas*, 874 F.2d at 1150–51; *United States v. Anderson*, 896 F.2d 1076, 1078 (7th Cir. 1990); *United States v. Jimenez Recio*, 371 F.3d 1093, 1104–05 (9th Cir. 2004). Those rulings are clearly based on the Double Jeopardy Clause or the underlying values it is meant to protect—although of course the review they offer is a poor substitute for sufficiency review prior to the second trial. *See Abney v. United States*, 431 U.S. 651, 662 (1977) ("[I]f a criminal defendant is to avoid *exposure* to

double jeopardy and thereby enjoy the full protection of the Clause, his double jeopardy challenge ... must be reviewable before that subsequent exposure occurs.").

In stark contrast, the First, Third, and Fourth Circuits have held that the sufficiency of the evidence from the first trial can *never* be challenged on appeal. *United States v. Julien*, 318 F.3d 316, 321 (1st Cir.), *cert. denied*, 539 U.S. 968 (2003); *United States v. Ntreh*, 142 Fed. Appx. 106, 109–10 (3d Cir. 2005); *United States v. Williams*, No. 92-5248, 1993 U.S. App. LEXIS 24718, at *9–10 (4th Cir. Sept. 24, 1993).

This conflict further illustrates the continuing disharmony and confusion in the courts of appeals—and their fundamental discomfort with the implications of extending *Richardson* from the mistrial context to cases like this one.

3. The government's attempt to distinguish *United States v. Greene*, 834 F.2d 86 (4th Cir. 1987), is simply wishful thinking.

First, it argues that *Greene* "does not squarely conflict" with the decision below because the government supposedly "'abandoned'" its jurisdictional argument, and the Fourth Circuit "appears" to have viewed that "as significant." Opp. 17. The requirements of the collateral order doctrine are jurisdictional, so it is irrelevant whether the government "abandoned" any argument. *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863,

869 n.3 (1994) ("We have of course held that the *Cohen* requirements go to an appellate court's subject-matter jurisdiction, and thus, were it necessary here, we would be obliged to assess whether each condition was met, without regard to whether the parties believe it to be satisfied.") (internal citation omitted). The Fourth Circuit had an independent obligation to address the jurisdictional issue and it did so. 834 F.2d at 89 ("We find that this court does have jurisdiction to consider the appeal of the defendant....").

Second, the government argues that the Fourth Circuit may, at some future point, decide to reject its prior decision. That is pure speculation, and the same could be said of *any* conflict among the circuits. The Fourth Circuit's view is as likely to gain additional adherents as to be reconsidered by that court. Indeed, Judge Kozinski has argued that his court should reach a defendant's alternative sufficiency argument when the government files an interlocutory appeal. *See United States v. Keating*, 147 F.3d 895, 904–05 (9th Cir. 1998) (Kozinski, J., concurring).

4. The government tries to manufacture a vehicle problem by arguing that Carpenter "raised double jeopardy concerns only to support his argument that the denial of a motion to acquit should be treated as a collateral order subject to immediate appeal," Opp. 12 n.4, and suggests that Carpenter instead should have filed a separate motion to dismiss on double jeopardy grounds, and should then have taken a separate appeal from the denial of that motion. In

other words, it contends that there is a jurisdictionally significant difference between an argument that appellate review of a sufficiency claim is appropriate because double jeopardy prohibits retrial if the evidence is insufficient, and an argument that double jeopardy prohibits retrial because the evidence was insufficient. This is pure sophistry.

First, it is difficult to see how Carpenter *could* have filed a separate double jeopardy motion. Immediately after the court granted Carpenter's new trial motion, the government filed its notice of appeal, divesting that court of jurisdiction. Surely the reviewability of a defendant's claim cannot turn on whether the government wins the race to the courthouse and gets its notice of appeal filed before the defendant can file a separate motion to dismiss.

Second, the government is essentially arguing that Carpenter should file a new motion to dismiss on double jeopardy grounds as soon as this case returns to the district court, and then pursue a renewed interlocutory appeal under the collateral order doctrine pursuant to *Richardson* and *Abney*. But it makes no sense to insist that a defendant present an argument that double jeopardy bars retrial, because of evidentiary insufficiency at the first trial, via a second interlocutory appeal rather than by cross-appeal when the government already has brought the case before the court of appeals.

5. The government also argues that Carpenter's claim cannot be appealed under the collateral order

doctrine because it is not separable from the merits of his sufficiency challenge. But this Court recognized in *Richardson* that if a defendant "seeks review of the sufficiency of the evidence at his first trial, not to reverse a judgment entered on that evidence, but as a necessary component of his separate claim of double jeopardy," 468 U.S. at 322, the collateral order doctrine is satisfied. Carpenter is clearly entitled to review of whether a conviction terminates jeopardy under these circumstances. And if a conviction *does* terminate jeopardy when the evidence is constitutionally insufficient, he is entitled to review of his sufficiency challenge—no matter how "entwined" with the merits it may be.

And even if this Court were inclined to extend *Richardson* and give the Double Jeopardy Clause a rigid and formal interpretation that would not itself support interlocutory review here, there is no reason to interpret the collateral order doctrine so narrowly, especially when the government has already taken an interlocutory appeal. The government concedes that the courts of appeals (and some state courts) have uniformly held that from the standpoint of fundamental fairness and judicial economy they will review alternative sufficiency arguments before ordering a retrial *even if doing so is not compelled by the Double Jeopardy Clause.* That same reasoning supports jurisdiction under the collateral order doctrine, born out of a flexible and pragmatic interpretation of finality, once the government has already initiated the appellate process.

The government also does not deny that the courts of appeals are deeply divided over the applicability of pendent jurisdiction in criminal cases, and that the Court could resolve the conflict in this case. Pet. 26–28. It instead asserts that the First Circuit made some "factual" finding that the government's appeal and Carpenter's cross appeal were not "inextricably intertwined." Opp. 19–20. The First Circuit held only that there is no "efficiency" exception to the collateral order doctrine, and that to address Carpenter's cross-appeal it would have to engage with issues outside the four corners of the government's appeal. Pet. App. 31a–33a. That is true in *every* case where a court finds pendent jurisdiction. There is nothing "factbound" about the First Circuit's analysis.

6. The opposition conspicuously has no response to the petition's demonstration that the rule the government extracts from *Richardson* is inconsistent with fundamental fairness, judicial economy, and the basic values underlying the Double Jeopardy Clause. Indeed, the government effectively concedes that *none* of the policy concerns weighing against interlocutory appeals in criminal cases—or favoring retrial after mistrials—are relevant here. Pet. 28–33. It offers no real defense of the result here at all, beyond its formalistic interpretation of *Richardson*'s "continuing jeopardy" principle. This Court has recognized that "continuing jeopardy" is a formal construct that must yield to the actual purposes of the Double Jeopardy Clause in appropriate cases. *See Oregon v. Kennedy*, 456 U.S. 667, 679 (1982). A similarly practical interpretation is appropriate here.

CONCLUSION

The petition should be granted.

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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the government, consistent with the protections of the Double Jeopardy Clause, can effectively foreclose the termination of "original jeopardy" by obtaining a guilty verdict through prosecutorial misconduct during summation and, once a new trial is granted, retry the accused before he can obtain appellate review of the sufficiency of the evidence at the initial trial?

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INTEREST OF AMICUS CURIAE

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit corporation with more than 11,200 members nationwide and 28,000 affiliate members in fifty states, including private attorneys, public defenders, and law professors.[1] NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the fair and proper administration of criminal justice.

Few protections are more basic or essential to the fair administration of criminal justice than the guarantee that a defendant will not be tried more than once for the same offense. "The defendant's interest in finality is not confined to final judgments; he also has a protected interest in having his guilt or innocence decided in one proceeding." *Oregon v. Kennedy*, 456 U.S. 667, 682 (1982) (Stevens, J., concurring). For its part, "[t]he Government . . . is entitled to resolution of the case by verdict from the jury." *Richardson v. United States*, 468 U.S. 317, 326 (1984). In circumstances such as those present in this case – where the government obtained a verdict, but the verdict was subsequently vacated due to post-evidentiary prosecutorial error – the defendant's

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[1] Pursuant to this Court's Rule 37, amicus states that no counsel for any party authored this brief in whole or in part, and no person or entity other than amicus made a monetary contribution to the preparation or submission of the brief. Counsel of record for all parties were timely notified 10 days prior to filing and have consented to the filing of this brief. Letters of consent have been filed with the Clerk of the Court.

interest in finality can be served only if his challenge to the sufficiency of the evidence is considered prior to re-trial.[2]

NACDL members seek a clearly stated rule that prevents this compelling interest in finality from being frustrated through reflexive and unduly rigid application of the collateral order doctrine. In the absence of such a clear rule, the Fifth Amendment's protection against double jeopardy will be illusory in the First Circuit and in those circuits that likewise rely upon a formalistic application of the collateral order doctrine to deny defendants in similar circumstances immediate interlocutory appellate review of their sufficiency claims.

SUMMARY OF ARGUMENT

NACDL respectfully urges the Court to grant the petitioner a writ of certiorari to resolve a conflict of law among the circuits, clarify the scope of appellate jurisdiction over criminal interlocutory appeals, and bring certainty to a procedural circumstance commonly encountered in criminal proceedings. At issue in this case is whether the federal appellate courts have jurisdiction to hear a defendant's cross-appeal of the denial of his motion for acquittal on sufficiency grounds after a jury has rendered a guilty verdict, where the government has appealed an order granting defendant a

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[2] We use the term "post-evidentiary error" to distinguish trial error that occurs after the conclusion of all the evidence, as compared with error that occurs in the issuing of the indictment or in the presentation of the case. The former affects only the jury's deliberations, not the quality or quantum of evidence introduced by either side. The latter necessarily implicates the presentation of evidence going forward, from the point of error onward.

new trial due to the prosecutor's improper summation. This Court's decisions in *Burks v. United States*, 437 U.S. 1 (1978), and *Richardson* counsel that the appellate courts *have* such jurisdiction and that, once the government has had a full and fair opportunity to present its best case against a defendant and failed to do so, retrial of the defendant would violate the Double Jeopardy Clause of the Fifth Amendment.

REASONS FOR GRANTING THE PETITION

This case presents the Court with an ideal opportunity to resolve a split that has developed among the circuits in the wake of *Burks* and *Richardson* regarding whether jeopardy terminates when a criminal trial results in something other than acquittal or an unreversed conviction. The Court should clarify that appellate courts have jurisdiction to entertain a defendant's interlocutory appeal challenging the sufficiency of the evidence introduced at his trial when he has already been granted a new trial on grounds of post-evidentiary prosecutorial error.

The decision below holds that a defendant can *never* have a valid double jeopardy claim when his conviction has been vacated for legal error. Pet. App. 27a. This decision represents an unwarranted and improvident extension of this Court's holding in *Richardson*, conflicts with decisions of the Fourth and Ninth Circuits, and is inconsistent with the double jeopardy principles previously espoused by this Court. Accordingly, we urge the Court to grant certiorari and reverse the decision below.

I. The Decision Below Evidences A Split Among The Circuits.

Petitioner was tried and convicted on numerous counts of mail and wire fraud. Pet. App. 4a-7a. Thereafter, petitioner filed a motion for a new trial under Fed. R. Crim. P. 33(b)(2), based, *inter alia*, on the prosecution's improper prejudicial statements in summation; petitioner also filed a motion for judgment of acquittal under Fed. R. Crim. P. 29(c), arguing that the evidence presented was insufficient to warrant a conviction. Pet. App. 7a. The district court granted the new trial motion, but denied the motion for acquittal. Pet. App. 7a. Pursuant to 18 U.S.C. § 3731, the government appealed the new trial ruling, and petitioner, pursuant to Fed. R. App. P. 4(b)(1)(A)(ii), filed a cross-appeal seeking review of the district court's denial of his motion for acquittal, contending that retrial would violate the Double Jeopardy Clause where the evidence presented against him at the first trial was insufficient. Pet. App. 7a-8a. The First Circuit affirmed the district court's grant of a new trial, but concluded that it did not have jurisdiction to entertain petitioner's interlocutory double jeopardy challenge. Pet. App. 33a.

The First Circuit reflexively adopted the reasoning of *United States v. Porter*, 807 F.2d 21 (1st Cir. 1986), which held that a defendant has no double jeopardy claim when his conviction is reversed for trial error. Pet. App. 27a (citing *Porter*, 807 F.2d at 24 & n.2) ("[A] defendant who succeeds on appeal in demonstrating that he is entitled to a new trial because of error at his first trial may not assert a Double Jeopardy bar to retrial. As his original jeopardy has not yet ended, there is no Double Jeopardy to avoid."). In so ruling, the First Circuit ignored that the government had a full and fair opportunity to prove guilt, that the presentation of the

case was uninterrupted by error until after the close of the evidence, and that the jury reached a verdict on the basis of insufficient evidence.

With little analysis, the First Circuit rejected the contrary reasoning of the Fourth Circuit in *United States v. Greene*, 834 F.2d 86, 89 (4th Cir. 1987) ("If Greene was entitled to a judgment of acquittal, this right is too important to be denied review, particularly since a retrial might result in twice placing him in jeopardy for the same crime."), and the Ninth Circuit in *United States v. Szado*, 912 F.2d 390, 392 (9th Cir. 1990) (holding that *Richardson* and *Abney v. United States*, 431 U.S. 651 (1977) counsel review of sufficiency claims notwithstanding the grant of a new trial).[3]

In holding that it lacked jurisdiction to entertain petitioner's sufficiency challenge, the First Circuit joined the Seventh and Tenth Circuits which have declared that a district court's grant of a new trial

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[3] The Ninth Circuit held in *Szado* that the district court erred in not reviewing the sufficiency of the evidence at defendant's trial before the magistrate judge. 912 F.2d at 392. Similarly, in *United States v. Keating*, 147 F.3d 895 (9th Cir. 1998), Judge Kozinski opined that the court should review a defendant's sufficiency claim at the same time it reviews the government's interlocutory appeal brought pursuant to 18 U.S.C. § 3731. *Id.* at 904-05 (Kozinski, J., concurring). But, another panel of the Ninth Circuit held in *United States v. Sarkisian*, 197 F.3d 966 (9th Cir. 1999), without any discussion of *Szado*, that the court lacked jurisdiction to entertain an interlocutory appeal to review the sufficiency of the evidence, finding that the defendant had no colorable double jeopardy claim because his jeopardy never terminated. 197 F.3d at 983. In this respect, *Sarkisian* aligns with the decisions of the First, Seventh and Tenth Circuits foreclosing appellate review of evidentiary sufficiency under similar circumstances.

effectively forecloses appellate review of evidentiary sufficiency in the first trial. *United States v. Ganos*, 961 F.2d 1284, 1285 (7th Cir. 1992) (holding that, after *Richardson*, the court did not have jurisdiction over the interlocutory appeal of the sufficiency claim); *McAleer v. United States*, 138 F.3d 852, 857 (10th Cir. 1998) (holding the court lacked jurisdiction because appellant has no colorable claim; original jeopardy did not terminate because district court granted defendant's motion for a new trial).[4] This case presents the Court with an ideal vehicle to resolve the split among the courts of appeals in the wake of *Burks* and *Richardson* by clearly delineating the terminus of "original jeopardy."

II. The Circuit Courts Have Not Consistently Applied This Court's Double Jeopardy Jurisprudence.

The opinions in *Burks* and *Richardson* when read together with the Court's previous double jeopardy

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[4] The Fifth and Sixth Circuits also appear to embrace the same continuing jeopardy rationale in their treatment of sufficiency claims on direct appeal. *United States v. Miller*, 952 F.2d 866, 874 (5th Cir. 1992) ("[W]e hold that double jeopardy does not bar this retrial, and because under *Richardson* jeopardy has not terminated, double jeopardy will not be available as a ground for challenging any subsequent conviction that may result."); *Patterson v. Haskins*, 470 F.3d 645, 657 (6th Cir. 2006) ("[A] retrial is not barred by *Burks* unless and until an appellate court enters judgment reversing a conviction on the ground that the evidence was insufficient to support the conviction. . . . Absent such a declaration, jeopardy continues, and the defendant can be tried once again on the same charges."). This logic, when applied in cases like petitioner's, makes the collateral order doctrine unavailable as a basis for appellate jurisdiction.

decisions, establish that appellate courts do have jurisdiction – in certain instances – to decide whether an accused may be subjected to a second trial when the evidence presented by the government in the first trial was legally insufficient to sustain a guilty verdict. The decision below, in concluding that retrial is barred only where the accused has first obtained a judicial determination of insufficiency, misapprehends the practical considerations underlying these well-settled principles and applies an overly technical analysis that is inconsistent with the more flexible approach counseled by this Court and adopted by other Circuits. *See Richardson*, 468 U.S. at 322.

The Double Jeopardy Clause of the Fifth Amendment provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V. For purposes of applying this Clause's protection against double jeopardy, this Court has had to determine both when original jeopardy begins and when it ends. The point at which jeopardy begins is now fairly clear. Jeopardy attaches when the jury is empanelled and sworn in a jury trial or when the first witness is sworn in a bench trial. *Crist v. Bretz*, 437 U.S. 28, 29 & 37 n.15 (1978). Identifying the various potential termini of original jeopardy, however, has proven to be substantially more difficult. *See, e.g.*, *Burks*, 437 U.S. at 9 ("The Court's holdings in this area . . . can hardly be characterized as models of consistency and clarity."); *Ganos*, 961 F.2d at 1286 (Ripple, J., concurring) ("[T]he present state of double jeopardy jurisprudence is hardly a seamless garment."); *United States v. Wood*, 958 F.2d 963, 969 (10th Cir. 1992) ("*Richardson* gives us little guidance on what events, other than an acquittal, terminate jeopardy.").

This Court has determined, for instance, that jeopardy terminates, and retrial of the accused for the same offense is barred, upon an un-reversed conviction, *In re Nielsen*, 131 U.S. 176, 188 (1889), an acquittal by a verdict duly rendered, *Kepner v. United States*, 195 U.S. 100, 130 (1904), a judgment of acquittal by the trial court prior to verdict, *Fong Foo v. United States*, 369 U.S. 141, 143 (1962), or a determination by an appellate court that the evidence at trial was insufficient, *Burks*, 437 U.S. at 18. At the other end of the spectrum, the Court has determined that the declaration of a mistrial upon the jury's failure to reach a verdict, or a reversal of a conviction because of the erroneous admission of evidence, does not terminate the initial jeopardy and therefore does not bar a second trial on the same charges. *See Richardson*, 468 U.S. at 325; *Lockhart v. Nelson*, 488 U.S. 33, 40 (1988).

No bright line separates these two extremes. With regard to the latter category of cases, the Court has reasoned that original jeopardy has not ended, but rather is "continuing." *Price v. Georgia*, 398 U.S. 323, 329 (1970) (noting that "[t]he concept of continuing jeopardy [is] implicit in [*United States v. Ball*, 163 U.S. 662 (1896)]"). The "principle" of continuing jeopardy, however, appears to rest on a policy determination that the protections of the Double Jeopardy Clause should not be broadly applied:

> While different theories have been advanced to support the permissibility of retrial, of greater importance than the conceptual abstractions employed to explain the *Ball* principle [of continuing jeopardy] are *the implications of that principle for the sound administration of justice*. Corresponding to the right of an accused to be given a fair trial is the societal interest in

> punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction.

United States v. Tateo, 377 U.S. 463, 466 (1964) (emphasis added); *see also Justices of Boston Mun. Court v. Lydon*, 466 U.S. 294, 308 (1984) ("Interests supporting the continuing jeopardy principle involve fairness to society, lack of finality, and limited waiver.").

Nevertheless, the Court has attempted to fit its precedent into some logical and objective framework. At one time, the Court advanced the concept of waiver to support its policy-based holding that a defendant who requests a new trial as one avenue of relief may be required to stand trial again, even when his conviction was reversed due to failure of proof at the first trial. *See Burks*, 437 U.S. at 6-10 (re-examining *Bryan v. United States*, 338 U.S. 552 (1950); *Sapir v. United States*, 348 U.S. 373 (1955); *Yates v. United States*, 354 U.S. 298 (1957); *Forman v. United States*, 361 U.S. 416 (1960)). In *Burks*, however, the Court concluded that those earlier decisions were "not [] consistent with what we believe the Double Jeopardy Clause commands," and that "[t]o the extent that our prior decisions suggest that by moving for a new trial, a defendant waives his right to a judgment of acquittal on the basis of evidentiary insufficiency, those cases are overruled." *Id.* at 12, 18.

If the decision in *Burks* overruling the waiver paradigm signaled to the appellate courts a new direction in the Court's double jeopardy jurisprudence, the arrival of *Richardson* only presaged more confusion. Indeed, a survey of the post-*Richardson* case law

reveals that the circuit courts have been wildly inconsistent in their application of this Court's double jeopardy precedents. *Compare, e.g., Szado*, 912 F.2d at 392 ("[A]pplication of the principles of [*Richardson* and *Abney*] directs a conclusion that [the] appeal falls within *Cohen*'s collateral order exception"), *with Miller*, 952 F.2d at 872 n.5 ("In light of our holding today, future appeals raising similar claims will no longer be colorable and will not be appealable before final judgment in this Circuit.").

Some courts have held that the Double Jeopardy Clause does not require review of the sufficiency of the evidence before a new trial where the retrial is a result of procedural error, instead waiting until *after* the defendant has endured a second trial before reviewing the sufficiency of the evidence at the *first* trial. *See, e.g., United States v. Recio*, 371 F.3d 1093, 1104 (9th Cir. 2004) (reviewing the sufficiency of evidence presented at the first trial after a *second* trial to determine if a *third* trial would violate the Double Jeopardy Clause); *United States v. Douglas*, 874 F.2d 1145, 1150 (7th Cir. 1989) (reviewing the sufficiency of the evidence presented at defendants' first trial after final judgment in a second trial).

Other courts, addressing the issue on appeal from a final judgment, have held precisely the contrary. *See, e.g., United States v. Haddock*, 961 F.2d 933, 934 (10th Cir. 1992) ("[W]hen we reverse on appeal because of a procedural error at trial and remand for a new trial, we nevertheless must address the defendant's claim that the evidence presented at trial on the reversed count was insufficient. . . . [I]f evidence indeed was insufficient, retrial is barred by double jeopardy principles."); *United States v. Simpson*, 910 F.2d 154, 159 (4th Cir. 1990) ("Lastly, even though we reverse

appellant's convictions on Rule 403 grounds, it is still necessary to reach his claim of insufficient evidence . . . . [I]f he were to prevail on this claim, the double jeopardy clause would bar his retrial."); *Vogel v. Pennsylvania*, 790 F.2d 368, 376 (3d Cir. 1986) ("[W]hen a defendant raises an insufficiency of evidence contention that the trial court finds unnecessary to address, a court subsequently presented with a double jeopardy argument must address and resolve that issue.").

Still other courts have determined that sufficiency of evidence arguments *should* be addressed before retrial, but that the Double Jeopardy Clause does not mandate such review. *See, e.g., United States v. Adkinson*, 135 F.3d 1363, 1379 n.48 (11th Cir. 1998) ("Although not mandated by the double jeopardy clause, it is clearly the better practice for the appellate court on an initial appeal to dispose of any claim properly presented to it that the evidence at trial was legally insufficient to warrant the thus challenged conviction."); *Miller*, 952 F.2d at 874 (same).

It is out of this fog of confusion that petitioner's case arrives at the Court.

III. *Richardson* Supports Interlocutory Appellate Review.

The First Circuit, like the courts of those circuits that share its reasoning, reads *Richardson* to mean that "a defendant who succeeds on appeal in demonstrating that he is entitled to a new trial because of error at his first trial may not assert a double jeopardy bar to retrial" because, "[a]s his original jeopardy has not yet ended, there is no double jeopardy to avoid." Pet. App. 27a; *see also United States v. Gutierrez-Zamarano*, 23 F.3d 235, 238 (9th Cir. 1994) (holding that where district court denies motion for acquittal based on sufficiency of

the evidence, but grants a new trial, "there has been no event terminating Appellant's original jeopardy"); *Ganos*, 961 F.2d at 1285 (reading *Richardson* to hold that there is no colorable double jeopardy claim before retrial "when *no court* has determined that the evidence at the first trial was insufficient" (emphasis added)). This extension of *Richardson* is wholly unwarranted and demonstrates the need for clarification of the Court's guiding principles.

This Court granted certiorari in *Richardson* to resolve a conflict between the D.C. Circuit's decision in that case and the Third Circuit's decision in *United States v. McQuilkin*, 673 F.2d 681 (3rd Cir. 1982). *See Richardson*, 468 U.S. at 320. In *Richardson*, following the declaration of a mistrial upon the jury's failure to reach a verdict, the D.C. Circuit dismissed for lack of jurisdiction petitioner's appeal of the district court's denial of his motion for acquittal based on the insufficiency of the evidence and his separate double jeopardy claim. *United States v. Richardson*, 702 F.2d 1079, 1083 (D.C. Cir. 1983) ("[S]ince Richardson's double jeopardy claim exists at the appellate level *only* if the district court's sufficiency of the evidence ruling is overturned, our refusal to review that ruling precludes any meaningful review of his double jeopardy claim at this time."). In dissent, then-Judge Scalia concluded that the appellate court did have jurisdiction to entertain Richardson's appeal, a disposition that he contended was supported by *McQuilkin*. *Id.* at 1089 (Scalia, J., dissenting).

In *McQuilkin*, the guilty verdict entered by a magistrate judge sitting as the trier of fact was reversed by the district court on the ground that appellants had been denied their statutory right to a jury trial. *McQuilkin*, 673 F.2d at 683. Appellants in *McQuilkin*

argued in a motion for reconsideration of the district court's order that the evidence against them in the first trial was insufficient to support a conviction and that a retrial would violate the Double Jeopardy Clause. *Id.* The Third Circuit, relying on this Court's decisions in *Burks* and *Abney v. United States*, 431 U.S. 651 (1977), concluded that it had jurisdiction under the collateral order doctrine to review the sufficiency of the evidence from the first trial as a necessary component of defendant's separate claim of double jeopardy. *McQuilkin*, 673 F.2d at 685.[5] *McQuilkin* reasoned that "[a]lthough the evidence which must be reviewed when determining whether a double jeopardy claim has been demonstrated may be the same as that considered on review of a conviction, that factor does not destroy appealability. Even though the evidence is reviewed for its sufficiency, it is, as *Abney* emphasizes, the *nature of the claim* that makes the case eligible for immediate appellate review." *Id.* (emphasis added).

In *Richardson*, this Court rejected the D.C. Circuit's narrow interpretation of the collateral order doctrine, which foreclosed interlocutory review of any double jeopardy claim when the outcome was dependent upon a

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[5] As then-Judge Scalia pointed out in his dissent in *Richardson*, "*McQuilkin* was foreshadowed by the same circuit's decision in *United States v. United States Gypsum Co.*, 600 F.2d 414 (3d Cir. 1979). There, defendants' convictions had been reversed on appeal without consideration of evidentiary sufficiency, and the case remanded. Prior to retrial, defendants moved for acquittal on the grounds of insufficient evidence at their first trial. The Third Circuit permitted appeal from denial of this motion because, it said, double jeopardy principles would prohibit retrial if the evidence at the first trial was insufficient." *Richardson*, 702 F.2d at 1089 n.5 (Scalia, J., dissenting).

review of the sufficiency of the evidence presented at the first trial. 468 U.S. at 321-22. Instead, this Court appeared to endorse the Third Circuit's approach in *McQuilkin*, reasoning that:

> Petitioner seeks review of the sufficiency of the evidence at his first trial, not to reverse a judgment entered on that evidence, but as a necessary component of his separate claim of double jeopardy. While consideration of petitioner's double jeopardy claim would require the appellate court to canvass the sufficiency of the evidence at the first trial, *this fact alone does not prevent the District Court's order denying petitioner's double jeopardy claim from being appealable.*

Id. at 322 (emphasis added).[6] Furthermore, this Court applied a "practical rather than [] technical" construction of the jurisdictional rules, *id.* (quoting *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949)), in concluding that petitioner's double jeopardy claim was "colorable," and therefore, that the appellate court had jurisdiction to entertain the claim. *Id.* ("[W]e have indicated that the appealability of a double jeopardy claim depends upon its being at least 'colorable.'" (citation omitted)). This "practical" rather than "technical" consideration seemed to mirror the shift that had occurred in *Burks*, where the Court looked

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[6] The confusion wrought by this Court's decision in *Richardson* appears to have extended to leading commentators and legal scholars. *See, e.g.*, 15B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice & Procedure § 3918.5 (2d ed. 1992 & Supp. 2007) (wrongly stating that in the wake of *Richardson*, *McQuilkin* "must be regarded as overruled").

to balance society's interest in ensuring that the guilty are punished with the accused's interest in being free from repeated prosecution. *Burks*, 437 U.S. at 15-16. Although the *Richardson* Court ultimately concluded that initial jeopardy did not terminate upon discharge of a *hung jury*, and thus the petitioner there had no valid double jeopardy claim to prevent his retrial, the Court plainly recognized that some event, *other than an acquittal or un-reversed conviction*, could terminate jeopardy. *Richardson*, 468 U.S. at 325.

IV. Review Of The Double Jeopardy Claim On Petitioner's Cross-Appeal Will Not Delay Proceedings Below.

The decision below rejects the premise that an interlocutory sufficiency review prior to retrial would result in substantial judicial efficiency. Pet. App. 31a-33a. In focusing so narrowly on the efficiencies (or lack thereof) to be achieved by the appellate court itself, however, the decision below altogether ignores the systemic efficiencies that would be achieved if an interlocutory sufficiency review was conducted in this and other similarly situated cases.

Contrary to the First Circuit's implication that such a review would slow the wheels of justice, Pet. App. 32a-33a, an appellate review of the evidence presented at petitioner's first trial might obviate the need to conduct a second trial at all. As this Court recognized in *Richardson*, where a defendant asserts his double jeopardy claim at the conclusion of his first trial, and before his second trial has begun, the timing is ideal, because there has been "no effort to interrupt or delay proceedings during the time that a jury was empanelled or that the District Court had under advisement motions relating to the first trial." *Richardson*, 468 U.S. at 322;

see also Richardson, 702 F.2d at 1089 (Scalia, J., dissenting) (stating that interlocutory sufficiency review was appropriate where appeal was taken "[not] in the midst of an ongoing trial, but during an interlude that has already occurred, requiring the selection and empanelling of a new jury. Not infrequently, such interludes are in any event protracted."). In all events, here it was the government's misconduct during closing argument, and its appeal of the trial court's grant of a new trial, which caused the appellate "interlude," not any action by petitioner to interrupt or delay the proceedings.

V. The Decision Below Rests On A Misapplication Of *Richardson* And *Burks*.

The decision below, relying on the First Circuit's earlier decision in *Porter*, improperly extends the holding in *Richardson* that a mistrial does not terminate jeopardy to an entirely different set of facts – the vacatur of a conviction on grounds of post-evidentiary prosecutorial error. Pet. App. 26a-27a. In *Porter*, the First Circuit held that because the reversal of the defendant's conviction for trial error (improper admission of inculpatory statements) did not terminate his original jeopardy, the defendant did not have a viable double jeopardy claim, and the appellate court therefore need not review the sufficiency of the evidence presented at the first trial as a prerequisite to retrial. *Porter*, 807 F.2d at 23-24. In so holding, the First Circuit concluded that the principles upon which the Court relied in *Richardson* were "equally applicable here." *Id.* at 23. Specifically, the *Porter* court opined that "[j]ust as society has a strong interest in retrying a defendant after his jury cannot agree on a verdict, so it also has a strong interest in providing the government

with a full and fair opportunity to prosecute a defendant whose conviction is reversed due to trial error." *Id.* Further, the court indicated that its expansion of *Richardson* would mitigate any concern that reversal for trial error would result in the guilty going unpunished. *Id.* (quoting *Burks*, 437 U.S. at 15).[7]

In referring to "trial error" in the general sense, *Porter* made no distinction between those errors that influence the presentation of evidence and those that come after the evidence is closed. In the former circumstance, evidentiary rulings will necessarily influence the course of the case going forward, and *Porter*'s reasoning is thus arguably defensible. In the latter situation, however, where the government injects error into the proceedings *after* it has presented all the evidence it could marshal against the defendant, the balancing of the equities espoused by *Porter* breaks down. Therefore the decision below, which blindly follows *Porter*, is untethered to either reliable precedent or sound reasoning.

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[7] The First Circuit misread *Richardson*'s analysis. *Richardson* merely reiterated a rule that followed from a long line of cases squarely addressing the applicability of the Double Jeopardy Clause to *hung juries* in holding that "the failure of the jury to reach a verdict is not an event which terminates jeopardy," 468 U.S. at 325, which clearly does not answer the question presented here. Indeed, the *Richardson* Court distinguished its decision from those cases where the jury arrived at a verdict, explaining, "[w]e are entirely unwilling to uproot this settled line of cases by extending the reasoning of *Burks*, which arose out of an appellate finding of insufficiency of evidence to convict following a jury verdict of guilty, to a situation where the jury is unable to agree on a verdict." *Id.* at 324.

This Court's decision in *Burks* instructs that even if trial error might otherwise result in a new trial, where the evidence presented by the government at the first trial was so lacking that the case should not even have been *submitted* to the jury, it would negate the protections of the Double Jeopardy Clause to subject the defendant to a second trial for the same offense. 437 U.S. at 15-18. *Porter*'s contrary reasoning, which accords greater weight to society's interest in providing the government with another opportunity to prosecute a defendant whose conviction is reversed due to trial error, is less convincing when the trial error in no way impacted the prosecution's evidentiary strategy or impeded the prosecution's ability to present its best case. On these facts, "the prosecution cannot complain of prejudice, for it has been given one fair opportunity to offer whatever proof it could assemble." *Id.* at 16.

Equally unpersuasive is the notion that society would pay too high a price were every accused granted immunity from further prosecution because of any defect in the proceedings sufficient to constitute reversible error. *Porter*, 807 F.2d at 23. That concern is not implicated where, as here, petitioner *will* be retried if the appellate court ultimately determines that the evidence presented at the first trial was sufficient to sustain the verdict. The evidence presented against petitioner was either sufficient or it was not. If it was sufficient, then society's interest in retrying the accused will be vindicated. If it was *not* sufficient, then the government will have had its one full and fair opportunity to present its best case, and no legitimate interest could possibly be served by subjecting the accused to the rigors of a second trial for the same offense. *See United States v. Difrancesco*, 449 U.S. 117, 127-28 (1980) ("[T]he State with all its resources and

power should not be allowed to make repeated attempts to convict an individual for an alleged offense . . . ." (internal quotations omitted)).

In *Burks*, the Court stated that "[t]he Double Jeopardy Clause *forbids* a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." 437 U.S. at 11 (emphasis added); *see also Tibbs v. Florida*, 457 U.S. 31, 41 (1982). To the extent the First Circuit and other courts of appeals have read *Richardson* to limit or diminish *Burks*, those courts have erred. *See Lockhart*, 488 U.S. at 40-41 ("It is quite clear from our opinion in *Burks* that a reviewing court must consider all of the evidence admitted by the trial court in deciding whether retrial is permissible under the Double Jeopardy Clause – indeed, that was the *ratio decidendi* of *Burks*, see 437 U.S., at 16-17 – and the overwhelming majority of appellate courts considering the question have agreed." (footnote omitted)). If a criminal defendant is to truly enjoy the protections that the Fifth Amendment guarantees, immediate appellate review cannot be so casually cast aside. *Abney*, 431 U.S. at 662.

VI. The Decision Below Conflicts with *Abney*'s Endorsement Of Interlocutory Review Of Double Jeopardy Claims.

Finally, the decision below endorses an absolutist rule that a defendant can *never* have a valid double jeopardy claim when his conviction has been vacated for legal error. Pet. App. 27a. By effectively eliminating *all* interlocutory review of double jeopardy claims where the defendant has sought a new trial, the decision below is in direct conflict with *Abney*. In *Abney*, the Court encouraged interlocutory review of claims that implicate double jeopardy rights, recognizing that "the rights

conferred on a criminal accused by the Double Jeopardy Clause would be significantly undermined if appellate review of double jeopardy claims were postponed until after conviction and sentence." 431 U.S. at 659-60. Accordingly, the Court concluded that "if a criminal defendant is to avoid *exposure* to double jeopardy and thereby enjoy the full protection of the Clause, his double jeopardy challenge to the indictment must be reviewable before that subsequent exposure occurs." *Id.* at 662.

* * *

We respectfully submit that this Court should grant petitioner certiorari and clarify that appellate courts do have jurisdiction immediately to review defendants' claims that the prosecution failed to introduce sufficient evidence at trial once the conviction has been reversed due to post-evidentiary error.

The circumstances of this case present compelling grounds for intervention by the Court and clarification of this jurisdictional question. It was the prosecutor's misconduct during summation that necessitated a new trial, thereby preventing traditional termination of jeopardy through sentencing and entry of final judgment and prompt appellate review of the sufficiency challenge. A formalistic and narrow application of the collateral order doctrine to facilitate this result benefits only the government, and is impossible to square with the underlying principles of the Double Jeopardy Clause. NACDL urges the Court to rectify this glaring injustice in the present case and to announce a rule of appellate jurisdiction that will allow defendants to challenge government trial misconduct without sacrificing their double jeopardy rights.

CONCLUSION

The petition for a writ of certiorari should be granted.

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